IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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ANDREW BIGBEE,

Plaintiff,

OPINION and ORDER

05-C-66-C

v.

UNITED STATES OF AMERICA,

Defendant.

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This civil action for monetary relief under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, arises out of an incident in August 2004 in which staff at the Federal Correctional Institution in Oxford, Wisconsin confiscated and destroyed five leather purses made by plaintiff Andrew Bigbee in the institution's leatherwork program. In an order dated March 20, 2006, I ordered plaintiff to respond to defendant United States of America's motion for entry of judgment, in which it requested that the court enter judgment in favor of plaintiff in the amount of $313.67 less the costs defendant incurred after making an offer of judgment to plaintiff in that amount on February 27, 2006 that plaintiff rejected. Fed. R. Civ. P. 68(a). Plaintiff's response and defendant's reply were filed on March 23, 2006.

A provision of the Federal Tort Claims Act provides that a litigant may not file suit under the statute unless he "shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency." § 2675(a). Plaintiff submitted an administrative claim in the amount of $313.67 to the Bureau of Prisons on August 18, 2004. The bureau denied plaintiff's claim on November 9, 2004. Thereafter, plaintiff filed his complaint in this case, in which he requested $313.67 in "compensatory damages," $1,500.00 in "legal fees" and reimbursement of his costs for filing and litigating the suit. Defendant concedes liability in the amount of $313.67. As the prevailing party, plaintiff is entitled to an award of costs, 28 U.S.C. § 2412(a), which is governed by 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d). Therefore, the only remaining issues are plaintiff's requests for $1,500.00 in "legal fees" and defendant's request for costs.

Plaintiff has not explained what is encompassed by the term "legal fees." I construe it as a request for attorney fees. Plaintiff's request will be denied because he is not an attorney. The provision of the Tort Claims Act that addresses attorney fees, § 2678, states that "[n]o attorney shall charge, demand, receive or collect for services rendered" a fee that exceeds 25% of the amount of judgment. Not surprisingly, the provision's plain language authorizes attorney fees to be awarded only to attorneys. In addition, federal courts have denied prevailing pro se litigants attorney fees under a variety of federal statutes. Kay v. Ehrler, 499 U.S. 432, 435-38 (1991) (pro se attorney not entitled to attorney fees under §

1988); Redding v. Fairman, 717 F.2d 1105, 1120 (7th Cir. 1983) (same); see also Krecioch v. United States, 316 F.3d 684, 688 (7th Cir. 2003) (pro se litigant not entitled to attorney fees under Equal Access to Justice Act); DeBold v. Stinson, 735 F.2d 1037, 1042-43 (7th Cir. 1984) (pro se litigant not entitled to attorney fees under Freedom of Information Act); Tam v. United States, No. 98 Civ. 009(BSJ), 2000 WL 1234576 (S.D.N.Y. Aug. 30, 2000) (pro se litigant not entitled to attorney fees under Federal Tort Claims Act). In Kay, 499 U.S. at 438, the Court reasoned that the "statutory policy of furthering the successful prosecution of meritorious claims is better served by a rule that creates an incentive to retain counsel in every such case." I see no reason why this rationale should not apply to actions brought under the Federal Tort Claims Act.

Even if I did not construe plaintiff's request for "legal fees" as a request for attorney fees, and instead construed it as a request for additional compensatory damages, I would still deny it. As defendant notes, a provision of the Federal Tort Claims Act, 28 U.S.C. § 2675(b), limits plaintiff's recovery to the amount specified in his administrative claim, "except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim." Defendant argues that plaintiff has not introduced any newly discovered evidence or proven any intervening facts that would entitle him to a judgment in excess of $313.67.

Plaintiff disagrees; he contends that he would prove intervening facts at trial concerning the investigation of his administrative claim that will warrant a judgment in excess of the amount claimed in his administrative claim. He states that the investigation of his administrative claim was mishandled because a prison official against whom plaintiff had made allegations of wrongdoing in the claim investigated the claim. He argues that there was no way he could have known at the time he filed his claim that it would not be investigated fairly and impartially. Finally, he contends that the only reason he was forced to file a lawsuit was because the administrative investigation was mishandled.

Plaintiff's argument is off the mark. His allegations concern the investigation of his administrative claim. They have no bearing on the amount of damages he claimed in his administrative claim. In other words, the fact that the investigation of plaintiff's claim may have been mishandled does not affect the amount of damage plaintiff sustained when his purses were confiscated and destroyed. A different case would be presented if new facts had come to light after plaintiff filed his administrative claim that showed the value of the purses exceeded $313.67. But plaintiff has not made this argument. Therefore, the "newly discovered evidence" and "intervening facts" exceptions are not applicable in this case.

Finally, defendant contends that it is entitled to recoup from plaintiff the costs it incurred in taking plaintiff's deposition on March 10, 2006. Defendant made an offer of judgment to plaintiff "in the amount of $313.67, including costs to date" on February 27,

2006. Mot. for Entry of Judgment, dkt. #38, ex. A. Plaintiff rejected the offer in a letter dated March 2, 2006. Id., ex. B. Rule 68 provides in relevant part that if "the judgment obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."

In determining whether the judgment obtained by plaintiff is more favorable than the offer made by defendant, I note that defendant phrased its offer to plaintiff in ambiguous terms. Defendant offered judgment "in the amount of $313.67, including costs to date." By using the word "including," defendant did not make it clear that plaintiff would be able to recover his costs in addition to the $313.67 in damages. A reasonable person could interpret the language defendant used to mean that the entire amount plaintiff would receive under the terms of the offer, including all of his costs, was $313.67. Indeed, the language plaintiff used in rejecting defendant's offer makes it clear that he was under this impression:

> Here is my counter offer: The amount of the Tort Claim $313.67. The cost of filing $150.00. The cost of typing ribbons $19.47. The cost of correction ribbon $9.59. The cost of a Daisy Wheel $28.34 (we are required to buy all our typing supples [sic]). The costs of copies $42.45. The cost of postage $45.33. $1000.00 in legal fees and last but not least a phone to staff here at oxford reinstating me in to the leather program (3 months early).

If plaintiff had understood that he was entitled to costs from defendant plus the $313.67 it offered, he likely would not have itemized his costs in a "counter offer." (I assume that defendant's choice of language was not an attempt to pull a fast one on plaintiff.)

Because defendant used ambiguous language in its offer, I must construe it in plaintiff's favor. Cf. United States v. Floyd, 428 F.3d 513, 516 (3d Cir. 2005) (ambiguity in plea agreement construed against government where government drafted agreement). Accordingly, I find that defendant made an offer of judgment in the amount of $313.67, including costs. Because plaintiff is the prevailing party, he is entitled to $313.67 *plus* costs. This is a more favorable judgment than defendant's offer. Therefore, defendant is not entitled to recover the costs it incurred in taking plaintiff's deposition.

ORDER

IT IS ORDERED that the clerk of court is directed to enter judgment for plaintiff in the amount of $313.67 and close this case. Plaintiff may have until April 7, 2006 to submit a bill of costs pursuant to 28 U.S.C. § 1920 and Fed. R. Civ. P. 54(d).

Entered this 28th day of March, 2006.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge