

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

DANTRAN, INC., *et. al.*,

Plaintiffs

v.

Civil No. 97-266-P-C

UNITED STATES DEPARTMENT OF  
LABOR,

Defendant

GENE CARTER, District Judge

**MEMORANDUM OF DECISION AND ORDER**

Currently before the Court is Plaintiffs' Motion for Attorneys' Fees and Expenses ("Plaintiffs' Motion") (Docket No. 25). The Court will deny Plaintiffs' Motion.

The Court begins with an overview of the extensive procedural history surrounding this case. In 1993, the Department of Labor ("the Department") lodged a complaint against Dantran, Inc.,<sup>1</sup> ("Dantran") seeking to debar Dantran from contracts with the government arising out of alleged violations of the McNamara-O'Hara Service Contract Act of 1965, 41 U.S.C. §§ 351-58. The matter was first considered by an administrative law judge ("ALJ") at the Department. Following an evidentiary hearing, the ALJ determined that Dantran should not be debarred. The Department appealed this decision to the Department's Board of Administrative Review ("the Board"). The Board reversed the decision of the ALJ and ordered that Dantran be debarred. Dantran proceeded to appeal the decision of the Board to this Court pursuant to the Administrative Procedures Act. After considering the briefing of both parties, and reviewing the

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<sup>1</sup> Plaintiffs in this case are Dantran and Robert Holmes. Robert Holmes is the principal of Dantran. Throughout this opinion, the Court refers to Dantran and Plaintiffs interchangeably. The distinction between Dantran and Robert Holmes is of no importance here.

records of the proceedings below, this Court affirmed the decision of the Board and entered judgment in favor of the Department. (Docket Nos. 19 and 20). Dantran appealed to the United States Court of Appeals for the First Circuit. The Court of Appeals for the First Circuit reversed, with one judge concurring in part and dissenting in part. *See Dantran, Inc. v. Department of Labor*, 171 F.3d 58 (1<sup>st</sup> Cir. 1999). In accordance with the Mandate of the Court of Appeals, this Court entered an Amended Judgment in favor of Dantran. (Docket No. 24). Subsequently, Plaintiffs filed the instant Motion for Attorneys' Fees and Expenses, which has now been fully briefed by both sides.<sup>2</sup>

Plaintiffs' Motion seeks an award of fees and costs under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). The EAJA requires the government to pay the opposing party's litigation fees and expenses "if the opposing party prevails . . . and if the government's position was not substantially justified." *Allende v. Baker*, 891 F.2d 7, 8 (1<sup>st</sup> Cir. 1989).<sup>3</sup> Neither party has suggested that Plaintiffs here are not a prevailing party, nor does the Court have any independent basis upon which to question the conclusion that it is. Accordingly, the award of

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<sup>2</sup> Initially, the Court endorsed Plaintiffs' Motion for Attorneys' Fees and Expenses pursuant to Local Rule 7(b), because no objection had been filed by Defendant. This Court then entered a Second Amended Judgment (Docket No. 29) awarding fees and costs to Plaintiffs. Upon learning of the Second Amended Judgment, Defendant filed a motion to vacate the endorsement of Plaintiffs' Motion and for Leave to File a Late Objection to Plaintiffs' Motion, on the grounds that Defendant never received Plaintiffs' Motion. This dispute was eventually resolved by a Stipulation of the Parties (Docket No. 37), accepted by this Court, whereby Plaintiffs' withdrew their objection to Defendant's Motion to Vacate and for Leave, essentially allowing Defendant to file a response to Plaintiffs' original Motion for Fees and Expenses.

<sup>3</sup> The Equal Access to Justice Act provides, in pertinent part, that:

Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. §§ 2412(d)(1)(A).

attorneys' fees in this case will turn on whether or not the government's position was "substantially justified." Plaintiffs, obviously, contend that Defendant's position was not substantially justified, while Defendant disagrees.<sup>4</sup> Additionally, Defendant maintains a fallback argument that the EAJA does not apply to the administrative portions of this litigation, even if it is determined that the government position was not substantially justified. Under this alternative argument, as the Court understands it, Defendant would seek to reduce any award of fees and costs by any amount attributable to work before the ALJ or the Board.

In *Pierce v. Underwood*, 487 U.S. 552 (1988), the Supreme Court expounded on the meaning of the "substantially justified" standard in the context of the EAJA. Faced with settling the meaning of the phrase, the Court defined a "substantially justified" position as one which is "justified to a degree that could satisfy a reasonable person." *Id.* at 565. The Supreme Court went on to note that "a position can be justified even though it is not correct, and we believe it can be substantially (*i.e.*, for the most part) justified if a reasonable person could think it correct, that is, if it has a reasonable basis in law and fact." *Id.* at 566 n.2. Accordingly, under the *Pierce* standard, Plaintiffs are not entitled to fees and costs if a reasonable person could think that the Department's position in the debarment action had a reasonable basis in law and in fact.

The Court turns first to the Department's factual basis for bringing the debarment action. Among others, the Department apparently relied on the following facts in initiating the debarment action: First, Dantran paid its employees once a month, in violation of 41 U.S.C.

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<sup>4</sup> Plaintiffs offer an additional argument in support of their Motion. Plaintiff's contend that the Court of Appeals for the First Circuit implicitly concluded that Plaintiffs are entitled to fees and costs. Plaintiff's argument is based on the fact that the Court of Appeals for the First Circuit awarded Plaintiffs the costs of their appeal, in the amount of \$593.57, pursuant to Federal Rule of Appellate Procedure 39(b). Apparently, the Department chose not to contest Plaintiffs' Bill of Costs, and the Court of Appeals awarded the costs without objection. Plaintiffs' contention that this award of costs – in the absence of objection – represents a legal determination by the Court of Appeals for the First Circuit on the merits of this Motion is unpersuasive. This Court is not bound by a ministerial award of costs for a proceeding in another court, in the absence of objection from the Department, and in the absence of any indication that the award of costs was predicated upon legal or factual analysis.

§ 353(a) and 29 C.F.R. § 4.165(b). Second, Dantran engaged in a practice of cross-crediting fringe benefits, in a manner that reduced the benefits received by some employees, in violation of 41 U.S.C. § 351(a)(2) and 29 C.F.R. § 4.172. Third, prior to the initiation of the debarment proceeding, Plaintiffs did not contest either of these two facts. Indeed, while Plaintiffs have vigorously argued throughout this lengthy process that these practices were legal, the Court is unaware of any instance in which Plaintiffs have denied that they paid employees once a month or that they cross-credited fringe benefits. Plaintiffs stress one additional fact as evidence that the Department did not have a reasonable basis in fact to proceed with the debarment action. In particular, Plaintiffs note that a Department investigator had previously given Dantran a clean bill of health despite his awareness of Dantran's practice of paying its employees once a month. This fact, however, does not undermine the Department's reliance on Dantran's continued violation of the law, by paying its employees once a month, as a basis for pursuing the debarment action.<sup>5</sup> Accordingly, the Court finds that a reasonable person would conclude that the Department had a reasonable basis in fact to bring the debarment action.

Having determined that a reasonable person would conclude that the Department had a reasonable basis in fact to bring the debarment action, the Court must next examine the reasonableness of the Department's legal basis for maintaining the debarment proceeding. Between the four judicial bodies that have already considered the legal issues raised by the debarment action, much ink has already been spilled in analyzing the arguments on both sides. Turning first to the Court of Appeals for the First Circuit, the majority disagreed with the Department's legal position with respect to cross-crediting, such that it alone could not form the

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<sup>5</sup> Plaintiffs point to various other facts that they contend demonstrate that the Department did not have a reasonable basis in fact for pursuing the debarment action. Plaintiffs argue that the fines and penalties imposed on them by the Department were of great harm to them. While it may be true that these fines and penalties were devastating to Plaintiffs, the fact remains that Plaintiffs violated the law, and the Department sought debarment on that basis. The Court is unwilling to find – indeed, it would be contradictory to do so – that the fines and penalties imposed for violations of the law demonstrate that the Department did not have a reasonable basis in fact to pursue an additional sanction – debarment – for the very same violations.

basis of a debarment. *See Dantran*, 171 F.3d at 65. The court then determined that Dantran's use of monthly, as opposed to bi-monthly, payments to employees was a violation of the law. *See id.* at 65-66. Having determined that Dantran had violated the law with respect to monthly payments, the majority conducted a lengthy analysis to determine if this violation was a sufficient ground upon which to base a debarment. *See id.* at 68-69. Ultimately, the court concluded that a violation of the law, without more, is an insufficient basis to debar, "[t]here must be affirmative evidence of culpable conduct." *See id.* at 69. Finally, the majority rescinded the debarment, and reversed this Court with clear instruction that the matter was not to be remanded to the Board. *See id.* at 74-75.

Senior Circuit Judge Cudahy concurred in part and dissented in part. *See id.* at 75. With respect to cross-crediting, Judge Cudahy agreed with the majority's ultimate conclusion that the allegations regarding cross-crediting could not alone support debarment. *See id.* at 76. But unlike the majority, Judge Cudahy's conclusion on this point resulted from his position that the regulations in question "are self-contradictory and too vague and ambiguous to be enforced." *See id.* With respect to the monthly payments to employees, Judge Cudahy was more concerned with Dantran's activities than was the majority, but Judge Cudahy saw remand to the Board as a proper remedy as opposed to the majority's decision to reverse the Board. *See id.*

The Court is satisfied that the decision of the Court of Appeals for the First Circuit, taken as a whole, demonstrates that the Department had a reasonable basis, in law, for maintaining the debarment action. As the Supreme Court made clear in *Pierce*, "a position can be justified even though it is not correct." *See Pierce*, 487 U.S. at 566 n.2. Although the majority ultimately concluded that debarment was inappropriate, all three judges on the panel concluded that Dantran's undisputed practice of paying employees once a month was a violation of the law. To the extent that this violation was one legal basis upon which the Department sought debarment, the Court is satisfied that a reasonable person would find this to be a substantial justification in law. Based on the opinion above, the Court is further satisfied that a reasonable person would

conclude that the Department's legal position in seeking debarment based both upon the improper monthly payments and the cross-crediting is substantially justified.

In addition to the opinion of the Court of Appeals for the First Circuit, the determinations of the three other judicial tribunals that considered the legal arguments in this case provide further support for the conclusion that the Department had a reasonable legal basis for maintaining the debarment action. While the ALJ determined that debarment was not warranted, the Board reversed, finding a legal basis for debarment. Subsequently, this Court, in affirming the Board's decision, determined that the Board's findings were not arbitrary or capricious. The distinct findings of the ALJ and the Board, coupled with this Court's determination that the Board's decision was not arbitrary or capricious when it held for the Department, lend support for the conclusion that the Department had a reasonable basis in law for maintaining the debarment action against Plaintiffs. Therefore, the Court finds, based on the opinion of the Court of Appeals for the First Circuit, as well as on the decisions of the ALJ, the Board, and of this Court, that a reasonable person would conclude that the Department had a substantial justification in law for maintaining a debarment action against Plaintiffs.<sup>6</sup>

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<sup>6</sup> The Court acknowledges that the Supreme Court in *Pierce* demonstrated a reluctance to rely on what it labeled "objective indicia" in determining whether a position of the government had been substantially justified. Specifically in *Pierce*, the Supreme Court was unwilling to rely on the government's settlement of a suit – on what were characterized as terms unfavorable to the government – as proof that the government's position was not substantially justified. *Pierce*, 487 U.S. 568. With respect to a settlement, which can be motivated by an infinite number of factors other than the legal merits of one's position, the Court was correct in stating that "[w]hile we do not disagree that objective indicia can be relevant, we do not think they provide a conclusive answer, in either direction, for the present case." *Id.* This Court's reliance on objective indicia in this case – specifically the decisions of the four judicial tribunals that have considered this matter – is entirely consistent with the holding in *Pierce*. Here, the Court has the benefit of multiple opinions based on factual and legal analysis. In *Pierce*, the Supreme Court had only the fact in gross of a settlement. Furthermore, the *Pierce* Court found it necessary – in the absence of sufficient objective indicia – to conduct a through analysis of the government's legal position in order to determine if it was substantially justified. *Id.* at 569. Such an analysis, in the form of the decision of the Court of Appeals for the First Circuit, already exists in this case. The holding of *Pierce* cannot be read to require this Court to essentially repeat the legal analysis already conducted by the Court of Appeals, and the Court will not do so.

In summary, the Court finds that a reasonable person would conclude that the Department was substantially justified, both in law and in fact, in seeking debarment of Plaintiffs. Therefore, Plaintiffs are not entitled to attorneys' fees and costs under the EAJA.<sup>7</sup>

Accordingly, it is hereby **ORDERED** that Plaintiffs' Motion for Attorneys' Fees and Expenses be, and it is hereby, **DENIED**. It is further **ORDERED** that the Second Amended Judgment (Docket No. 29) be, and it is hereby, **VACATED**. Finally, it is **ORDERED** that Judgment be entered in favor of Dantran, Inc. and Robert Holmes and against the United States Department of Labor without an award of fees or costs.

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GENE CARTER  
District Judge

Dated at Portland, Maine this 14<sup>th</sup> day of March, 2000.

DANTRAN INC  
plaintiff

RICHARD P. ROMEO, ESQ.  
[COR]  
SETH D. HARROW, ESQ.  
[COR LD NTC]  
SMITH, ELLIOTT, SMITH & GARMY, P.A.  
100 COMMERCIAL ST.  
SUITE 308  
PORTLAND, ME 04101  
774-3199

ROBERT HOLMES  
plaintiff

RICHARD P. ROMEO, ESQ.  
(See above)  
[COR]

v.

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<sup>7</sup> Because the Court has determined there is no entitlement to an award of fees or costs under the EAJA, the Court need not consider Defendant's alternative argument regarding the inapplicability of the EAJA to the administrative portions of this litigation.

LABOR, US DEPT  
defendant

FRANK V. MCDERMOTT, ESQ.  
[COR LD NTC]  
KEVIN E. SULLIVAN, ESQ.  
[COR LD NTC]  
U.S. DEPARTMENT OF LABOR  
OFFICE OF SOLICITOR  
JFK FEDERAL BUILDING, ROOM E- 375  
GOVERNMENT CENTER BOSTON, MA 02203  
617/565-2500