

**IN THE COURT OF APPEALS 12/17/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-CC-01232 COA**

**CHRISTOPHER EPPS, FRED CHILDS, ROBERT ARMSTRONG, BARRY PARKER AND  
DONALD RADFORD**

**APPELLANTS**

**v.**

**MISSISSIPPI DEPARTMENT OF CORRECTIONS**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES E. GRAVES, JR.

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT

ATTORNEYS FOR APPELLANTS:

P.J. TOWNSEND, JR.

WILLIAM G. WILLARD, JR.

RICHARD A. OAKES

JAMES W. BURGOON, JR.

ATTORNEY FOR APPELLEE:

JOSEPH A. GOFF

NATURE OF THE CASE: AWARD OF ATTORNEYS' FEES BY THE MISSISSIPPI  
EMPLOYEE APPEALS BOARD

TRIAL COURT DISPOSITION: THE MISSISSIPPI EMPLOYEE APPEALS BOARD IS

WITHOUT AUTHORITY TO GRANT SUCH AN AWARD

BEFORE THOMAS, P.J., COLEMAN, AND SOUTHWICK, JJ.

THOMAS, P.J., FOR THE COURT:

### SUMMARY

Larry Floyd, an inmate at the Mississippi State Penitentiary at Parchman, Mississippi, escaped from custody on November 17, 1991. Appellants were security officers of the Mississippi Department of Corrections (MDOC), who captured Floyd several miles south of the Penitentiary and returned him to custody. Floyd accused the Appellants of beating and physically abusing him, which resulted in the termination of the Appellants by the MDOC.

The terminations having resulted from the same factual situation, the Mississippi Employee Appeals Board (EAB) consolidated the appeals of Christopher B. Epps, Fred Childs, Robert Armstrong, Barry Parker, Donald Radford, Terry Winters, and Roger Little. The EAB determined on October 26, 1992, that the MDOC violated the Appellants' due process rights and reinstated them to their jobs with the MDOC. Following the EAB's ruling, the reinstated employees moved the EAB for an award of attorneys' fees. After a hearing on the matter, the EAB determined that they had the authority to award attorneys' fees; however, they concluded that equity required the award of attorneys' fees to be only half of what the Appellants requested.

On February 23, 1993, the MDOC appealed to the Circuit Court of Hinds County, Mississippi, on the sole issue of attorneys' fees, and the Appellants' cross-appealed the EAB's reduction of the amount of attorneys' fees awarded. The circuit court ruled on November 1, 1994, that there was no statutory authority for the EAB to award attorneys' fees. From that order the Appellants bring this appeal assigning one issue as error:

**I. WHETHER THE EMPLOYEE APPEALS BOARD HAS THE AUTHORITY TO ASSESS ATTORNEYS' FEES AGAINST A STATE AGENCY IN CASES WHERE THE EMPLOYEE APPEALS BOARD HAS RULED AN AGENCY HAS VIOLATED THE CONSTITUTIONAL RIGHTS OF AN EMPLOYEE?**

Finding no error, we affirm.

### ANALYSIS

The Appellants argue that there is statutory authority for the EAB to award attorneys' fees. They argue that this authority is found in sections 1983 and 1988 and section 11-55-5(1) of the Mississippi Code, the Litigation Accountability Act of 1988.

Section 1983 states in part:

Every person who . . . under color of [law], . . . subjects . . . any citizen of the United

States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1964).

Success on a section 1983 claim can be the basis for the award of attorneys' fees pursuant to section 1988. 42 U.S.C. § 1988 (1976). In pertinent part, the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, provides "[i]n any action or proceeding to enforce a provision of . . . 1983 . . . the court, in its discretion, may allow the prevailing party, other than the United States a reasonable attorney's fee as part of the costs."

The United States Supreme Court has spoken on the issue of whether a court in a civil rights action could award attorneys' fees for time spent in the preceding administrative process. *North Carolina Dep't of Transp. v. Crest St. Community Council*, 479 U.S. 6 (1986). In *Crest Street*, the question for the Court was "whether attorney's fees under § 1988 can be sought in a court action other than litigation in which a party seeks to enforce the civil rights laws listed in § 1988." 479 U.S. at 12. In *Crest Street*, residents of a community opposed the expansion of a highway that would have disrupted their park, church, and places of residence. *Id.* at 8. Following negotiations between the residents and the federal and state departments of transportation, the parties reached a compromise. *Id.* at 9. Respondents then brought an action in district court seeking an award of attorney's fees pursuant to § 1988. *Id.* at 11. The Supreme Court held that the action for attorney's fees was not an "action or proceeding to enforce the civil rights laws" listed under § 1988. *Id.* at 12. The Supreme Court affirmed the lower court in its denial of the fees holding that "§ 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws." *Id.*

In our case neither the MDOC nor the employee Appellants are appealing the findings of the EAB that the Appellants' due process rights were violated, nor has the MDOC appealed the order of the EAB reinstating the Appellants to their jobs. So, as in *Crest Street* above, the action in the circuit court below was not an action or "proceeding to enforce" the civil rights of the Appellants, rather a question of attorneys' fees. According to *Crest Street* the circuit court was correct in not awarding attorneys' fees because § 1988 prohibits an independent action for fees.

In the alternative the Appellants argue that the EAB is a court and that under § 1988 the EAB can award attorneys' fees. They assert that the Mississippi Supreme Court has recognized the EAB as a court citing *Gill v. Mississippi Dep't of Wildlife Conservation*, 574 So. 2d 586 (Miss. 1990) and *Hood v. Mississippi Dep't of Wildlife Conservation*, 571 So. 2d 263 (Miss. 1990). A review of these cases does not support the Appellants' claim. In *Gill*, the court found the EAB was a tribunal inferior. 574 So. 2d at 590-91. In *Hood* the court specifically addressed the EAB as an administrative agency and stated "the administrative agenc[y] . . . EAB ha[s] no authority to order the plethora of relief available in judicial proceedings involving Section 1983." 571 So. 2d at 268 n.4. In neither of these cases did the court address the question of whether an administrative agency could by its own rule or regulation and without specific statutory authority allow for the award of attorneys' fees.

The EAB is strictly a statutory creation under Mississippi Code Annotated section 25-9-129 (1991). The power and authority of the EAB is derived from this section and Mississippi Code Annotated sections 25-9-131 to -132. Nowhere in these statutory sections has the legislature given the EAB the

authority to award attorneys' fees. "[I]n the absence of . . . statutory authority therefor, this Court has never approved awarding . . . attorney's fees to the successful litigant." *Grisham v. Hinton*, 490 So. 2d 1201, 1205 (Miss. 1986). The power to authorize the award of attorneys' fees in cases tried before an administrative agency is generally accepted as a legislative prerogative. An administrative agency may not on its own initiative and without statutory authorization adopt rules providing for an award of attorneys' fees for participants appearing in hearings before the agency. Under the Mississippi Code Annotated, the legislature has not by any statutory enactment given the EAB the power to award attorneys' fees.

The Appellants argue if the EAB has no authority to award fees under section 1988 then the attorneys' fees were proper under section 11-55-5(1) of the Litigation Accountability Act of 1988. There are two reasons why the Litigation Accountability Act does not apply to this case. First, the EAB is not a court as defined under the Act. This section states "in any civil action commenced or appeal in any court of record in this state, the court shall award . . ." attorney's fees. Miss. Code Ann. § 11-55-5 (1) (Supp. 1996). A court can only award fees under this section.

Second, the EAB did not assess attorneys' fees under the Litigation Accountability Act. The EAB assessed the attorneys' fees pursuant to 42 U.S.C. §§ 1983-1988. The Act is very specific as to the findings a court must make for fees to be awarded. The Act requires the court to make a finding that an attorney or party either: 1) brought an action or 2) asserted any claim or defense that is without substantial justification, or 3) the action or claim or defense was interposed for delay or harassment, or 4) if it finds an attorney or party unnecessarily expanded the proceeding by improper conduct including, abuse of discovery procedures under the Mississippi Rules of Civil Procedure. The EAB made none of these required findings in its Order. Since there is no statutory authority that would permit the EAB to award attorneys' fees, this issue has no merit.

**THE JUDGMENT OF THE CIRCUIT COURT OF HINDS COUNTY THAT THE MISSISSIPPI EMPLOYEE APPEALS BOARD IS WITHOUT AUTHORITY TO GRANT THE AWARD OF ATTORNEYS' FEES IS AFFIRMED. ALL COSTS OF APPEAL ARE TAXED TO THE APPELLANTS.**

**BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**

**FRAISER, C.J., NOT PARTICIPATING.**