

Fourth Circuit Now Permits Awarding Attorney's Fees for Some Preliminary Injunctions, Bucking Precedent

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Plaintiffs who secure a preliminary injunction may now be able to recover attorney's fees in the Eastern District of Virginia, due to the Fourth Circuit's departure from its previous position that such plaintiffs are not "prevailing parties" for purposes of recovering attorney's fees.

On August 7, 2023, the Fourth U.S. Circuit Court of Appeals sitting *en banc* in *Stinnie, et al., v. Holcomb*, 77 F.4th 200 (4th Cir. 2023), overruled a previous circuit precedent, precluding preliminary injunctions from conveying "prevailing party" status to a plaintiff, which in turn precluded awards of attorney's fees. Under the "American rule," attorney's fees are typically not awarded to a prevailing party absent explicit statutory authority. In *Smyth ex rel. Smyth v. Rivero*, 282 F.3d 268 (4th Cir. 2002), the Fourth Circuit had held that — even when a statute authorized attorney's fees to a "prevailing party" — a preliminary injunction did not confer "prevailing party" status because of the "interplay of . . . equitable and legal considerations and the less stringent assessment of the merits of claims that are part of the preliminary injunction context." That categorical ban has now been softened, allowing for recovery of attorney's fees after obtaining a preliminary injunction in some cases.

The plaintiff in *Stinnie* sued under 42 U.S.C. § 1988(b), which provides that the "prevailing party" is eligible to recover reasonable attorney's fees. The plaintiff was granted a preliminary injunction, but under *Smyth* could not receive attorney's fees based on the injunction alone.

Writing for the majority, U.S. Circuit Judge Pamela A. Harris said that *Smyth* was too strict. "Although many preliminary injunctions represent only 'a transient victory at the threshold of an action,' some provide enduring, merits-based relief that satisfies all the requisites of the prevailing party standard," she wrote. "Because the plaintiffs here 'prevailed' in every sense needed to make them eligible for a fee award, we vacate the district court's denial of attorney's fees and remand for further proceedings."

The case was decided 7–4, with U.S. Circuit Judge A. Marvin Quattlebaum, Jr. writing a dissent. The majority's reasoning rested on three considerations. First, the court noted that there is "a broad consensus among other circuits" that a "merits-based preliminary injunction that is not undone or otherwise modified by a later court order may confer prevailing party status." Second, in the years since *Smyth*, the U.S. Supreme Court has clarified that a plaintiff can obtain a preliminary injunction only if she first shows a clear likelihood of success on the merits. This means preliminary injunctions no longer require a "less stringent assessment of the merits," which was one

of *Smyth*'s logical underpinnings. Last, the Fourth Circuit stated that *Smyth* may have undermined the policy behind § 1988(b), which was enacted "in furtherance of the policy of facilitating access to judicial process for the redress of civil rights grievances."

Takeaway

A successful preliminary injunction can now confer "prevailing party" status and eligibility for attorney's fees in the Fourth Circuit. While district courts retain discretion in ordering attorney's fees, *Smyth*'s bright-line rule is dead. Plaintiffs who secure a preliminary injunction under § 1988 are no longer categorically barred from recovering attorney's fees.

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