

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 14-1970

ROBERT D. DELEE,

Plaintiff-Appellant

v.

CITY OF PLYMOUTH, INDIANA,

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
THE HONORABLE JUDGE JAMES T. MOODY
No. 3:12-cv-00380

APPELLANT'S RESPONSE TO DEFENDANT-APPELLEE'S
OBJECTION TO BILL OF COSTS

INTRODUCTION

This Court should approve appellant Robert DeLee's Bill of Costs. As we show below, Federal Rule of Appellate Procedure 39(a)(3) authorizes an award of costs in this case, while nothing in the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. 4301 *et seq.*, (USERRA) prohibits or precludes such an award.

BACKGROUND

Plaintiff-Appellant Mr. DeLee filed this lawsuit under USERRA to challenge the City's refusal to pay him the full amount of longevity pay he would have received if he had remained continuously employed as a City police officer, instead of deploying to perform uniformed service. In accordance with 38 U.S.C. 4323(a), the Department of Justice served as counsel to represent Mr. DeLee in bringing his suit. After the district court entered summary judgment against Mr. DeLee, the Department of Justice continued to provide Mr. DeLee with legal representation to pursue his appeal.

On December 9, 2014, this Court entered its Opinion and Final Judgment reversing the district court's judgment, awarding costs to Mr. DeLee, and remanding for further proceedings consistent with its Opinion. On December 12, 2014, Mr. DeLee filed his Bill of Costs, in the amount of \$223.50. On December 23, 2014, the City filed its Objection to the Bill of Costs. On January 9, 2015, this Court ordered Mr. DeLee to respond to the City's Objection.

ARGUMENT

Federal Rule of Appellate Procedure 39(a)(3) presumptively awards costs to an appellant who achieves reversal of a district court judgment.¹ That presumption applies here because no other applicable statute dictates a contrary result. The fact that Mr. DeLee did not pay for the copying and binding costs for his appellate briefs and that the Justice Department would not bill him for those costs does not preclude him from filing a Bill of Costs. An award of such costs would require the City to reimburse Mr. DeLee's Department of Justice counsel by paying those costs to the United States Treasury.

The City acknowledges that, pursuant to Federal Rule of Appellate Procedure 39(a), "unless the law provides or the court orders otherwise," costs are taxed against the appellee if a judgment is reversed. As indicated, this Court reversed the district court's judgment, and ordered that costs should be taxed against the City. Moreover, no law "otherwise provides" that this Court cannot award costs to a USERRA plaintiff whose counsel is the Department of Justice. Accordingly, the Court's award of costs in favor of Mr. DeLee is appropriate.

The City's contention that USERRA precludes this Court's award of costs in Mr. DeLee's favor is specious. There is no doubt that USERRA authorizes the

¹ Rule 39 establishes a presumption that "if a judgment is reversed, costs are taxed against the appellee." See Fed. R. App. P. 39(a)(3).

Department of Justice to represent an aggrieved uniformed service member who is a plaintiff: “the Attorney General may appear on behalf of, and act as attorney for, the person on whose behalf the complaint is submitted and commence an action for relief under this chapter for such person.” 38 U.S.C. 4323(a)(1).²

In addition, USERRA provides that “[n]o fees or court costs may be charged or taxed *against* any person claiming rights under this chapter.” See 38 U.S.C. 4323(h)(1) (emphasis added). This provision, however, provides no support for the City’s position. This provision prevents costs from being assessed against USERRA *plaintiffs* such as Mr. DeLee, but affords no protection for *defendants*, such as the City, who have violated USERRA’s requirements.

Furthermore, in the same USERRA subsection that precludes taxing “fees or court costs” against a USERRA plaintiff, Congress authorized a court to award to any prevailing person “who obtained private counsel for such action or preceding” “reasonable attorney fees, expert witness fees, and other litigation expenses.” 38 U.S.C. 4323(h)(2). Mr. DeLee is not seeking any of the fees or expenses listed in

² In contrast, the United States itself may be the plaintiff in USERRA cases against a State, and the Justice Department also provides counsel in those cases. See 38 U.S.C. 4323(d)(2)(B). This is not such a case. The separate rule that costs “for or against the United States, its agency or officer will be assessed under Rule 39(a) only if authorized by law” does not apply because Mr. DeLee, not the United States, has filed a Bill of Costs to recover expenditures his Department of Justice counsel made. Fed. R. App. P. 39(b).

Section 4323(h)(2), as he did not obtain private counsel. In any event, nothing in Section 4323 addresses – much less precludes – recovery of the types of nominal copying and binding costs that Rule 39 presumptively awards a prevailing appellant, regardless of whether he obtained private counsel or Justice Department representation. Because nothing in USERRA precludes an award of appellate costs to Mr. DeLee because he is represented by government counsel, an award of costs against the City pursuant to Rule 39(a)(3) is appropriate. See, e.g., *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1174 (2013) (“[S]ilence does not displace the background rule that a court has discretion to award costs.”).

Although the City incorrectly characterizes a Department of Labor Annual Report as a Department of Justice “Guidance” (Objection 2), it is true that the Department of Justice would not attempt to bill Mr. DeLee for the copying and binding costs it incurred, even if Mr. DeLee had not prevailed on appeal. There is no reason, however, that the taxpayers – rather than the party that this Court determined violated the law – should bear the costs listed in Rule 39(a). There will be no unjust enrichment or windfall for Mr. DeLee should costs be awarded, because this Court may simply order the district court to require the City to directly pay the costs to the United States Treasury in its mandate. Special accounting and payment provisions in cases in which the United States is plaintiff and the Justice

Department is counsel, see 38 U.S.C. 4323, make clear that such a mechanism to recover costs permissible.

CONCLUSION

This Court should approve Appellant's Bill of Costs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2015, I electronically filed the foregoing Appellant's Response to Defendant-Appellee's Objection to Bill of Costs with the Seventh Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

s/ Jodi Danis
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Attorney