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I. Administrative Law

I. ADMINISTRATIVE LAW

Recovering Litigation Costs from the NLRB Under the Equal Access to Justice Act

The high cost of litigation may deter individuals and organizations from seeking judicial review of governmental actions that lack reasonable bases in law or fact.[1] Congress enacted the Equal Access to Justice Act[2] (Act) to encourage individuals and organizations to resist unreasonable governmental intrusion.[3] Section 203 of the Act allows eligible parties[4] who prevail[5] in agency adversarial proceedings to recover attorney fees and expenses from the federal

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1. *See* 5 U.S.C. § 504 note (Supp. V 1981) (congressional finding that expense of litigation deters parties from defending against unreasonable government conduct). Governmental action is unreasonable within the meaning of the Equal Access to Justice Act (Act) if on review the government cannot substantially justify its positions in underlying agency actions or civil litigation. *Id.* § 504 (a)(1); 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981); *see infra* note 9 and accompanying text (substantially justified standard is essentially test of reasonableness).

2. Equal Access to Justice Act, PUB. L. No. 96-481, Title II, 94 Stat. 2325 (1980), *codified at* 5 U.S.C. § 504 (Supp. V 1981), 28 U.S.C. § 2412 (Supp. V 1981).

3. H.R. REP. No. 1418, 96TH CONG., 2D SESS. 5-6, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 4984 [hereinafter cited as H.R. REP. No. 1418]. The disparity of resources between the federal government and individuals magnifies the economic deterrent to contesting governmental action. *Id.* at 4988. The purpose of the Act is to diminish the economic deterrent to contesting governmental actions by providing for the award of attorney fees and expenses. H.R. REP. No. 1434, 96th Cong., 2d Sess. 21, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 5003, 5010 [hereinafter cited as H.R. REP. No. 1434]; *see infra* notes 6 & 13 (fees and expenses recoverable under Act).

4. 5 U.S.C. § 504(b)(1)(B) (Supp. V 1981). The Act defines eligible parties as individuals whose net worth does not exceed $1 million and unincorporated businesses; partnerships, corporations, associations, and public or private organizations whose net worth does not exceed $5 million. *Id.* The Act excludes, however, certain cooperative associations and tax-exempt organizations from the $5 million net worth limitation. *Id.; see* 12 U.S.C. § 1141(j)(a) (1976 & Supp. V 1981) (farmer cooperative associations exempt from Act's $5 million net worth limitation); 26 U.S.C. § 501(c)(3) (1976 & Supp. V 1981) (community organizations serving educational, religious, or charitable purposes may be exempt from Act's $5 million net worth limitation). Net worth within the meaning of the Act is total assets less total liabilities. H.R. REP. No. 1418, *supra* note 3, at 4994. The Act also excludes unincorporated businesses, partnerships, corporations, associations, or organizations having more than 500 employees. 5 U.S.C. § 504(b)(1)(B) (Supp. V 1981); 28 U.S.C § 2412(d)(2)(B) (Supp. V 1981). Congress designed the Act's eligibility requirements to limit the Act to individuals and small businesses for whom the cost of litigation may deter the vindication of rights. H.R. REP. No. 1418, *supra* note 3, at 4994.

5. 5 U.S.C. § 504(a)(1) (Supp. V 1981). In ensuring that parties have sufficient resources to contest governmental actions, Congress intended the Act's reference to prevailing parties to be consistent with the law that has developed around existing fee recovery legislation. *See* H.R. REP. 1418, *supra* note 3, at 4990; *see also* Bradley v. School Bd. City of Richmond, 416 U.S. 696, 721-23 (1974) (party may prevail for purposes of fee award even though party does not prevail on all issues); Foster v. Boorstin, 561 F.2d 340, 342-43 (D.C. Cir. 1977) (party may prevail for purposes of fee award if party obtains favorable settlement of case); Van Hoomissen v. Xerox Corp., 503 F.2d 1131, 1133 (9th Cir. 1974) (party prevailing on interlocutory appeal was prevailing party for purposes of fee award); Corcoran v. Columbia Broadcasting Sys., 121 F.2d 575,

government.[6] The Act provides that agencies conducting adjudicative proceedings[7] will award fees and expenses to prevailing parties unless the agency's adjudicative officer[8] finds that the agency's position in the proceeding was substantially justified[9] or that special circumstances make an award unjust.[10]

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576 (9th Cir. 1941) (defendant may prevail if plaintiff seeks voluntary dismissal of groundless point); Parker v. Matthews, 411 F. Supp. 1059, 1064 (D.D.C. 1976) (party may recover fee award by prevailing on interim order central to case), *aff'd* 561 F.2d 320 (D.C. Cir. 1977).

6. 5 U.S.C. § 504(a)(1) (Supp. V 1981). The Act defines fees and expenses to include the expense of expert witnesses, the cost of any study or analysis, and attorney fees that the agency's adjudicative officer finds to be reasonable and necessary for the party's case against the agency. *Id.* § 504(b)(1)(A). The Act, however, will not compensate attorneys at a rate in excess of $75 per hour or expert witnesses at a rate in excess of the highest rate of compensation for agency witnesses. *Id.* Congress intended the award of fees and expenses to act as an administrative remedy to unreasonable governmental action. H.R. REP. 1418, *supra* note 3, at 4991; *see* Rowe, *The Legal Theory of Attorney Fee Shifting: A Critical Overview*, 1982 DUKE L.J. 651, 653-66 (rationales underlying fee-shifting legislation).

7. 5 U.S.C. § 504(b)(1)(C) (Supp. V 1981). The Act defines adversary adjudications as administrative proceedings in which counsel represent the position of the United States. *Id.; see id.* § 554(a) (adversary adjudications to which Act applies). Congress intended for the Act's definition of adversary adjudication to preclude fee awards when an agency does not take a position in the adjudication. *See* H.R. REP. No. 1434, *supra* note 3, at 5012.

8. *See* 5 U.S.C. § 504(b)(1)(D) (Supp. V 1981). The Act defines "adjudicative officer" to be the deciding official who presides at the adversary adjudication whether or not the deciding official possesses the designation of administrative law judge, hearing officer, examiner, or otherwise. *Id.*

9. *Id.* § 504(a)(1). The test of whether or not an agency's action is substantially justified is one of reasonableness. H.R. REP. No. 1418, *supra* note 3, at 4989. The adjudicative officer may award parties fees unless the governmental agency's case had a reasonable basis in law and fact. *Id.* The fact that the government lost in the adversary adjudication, however, does not raise a presumption that the government's position was not substantially justified. *Id.* at 4990. Nor does the "substantially justified" standard require the agency to show that the agency based its decision to litigate on a substantial probability of prevailing. *Id.* Congress designed the "substantially justified" standard merely to balance the executive's obligation to execute the laws against the public's interest in vindicating rights. *Id.* at 4989.

10. 5 U.S.C. § 504(a)(1) (Supp. V 1981). Congress did not intend for the Act to deter government agencies from advancing novel but credible interpretations of the law and therefore Congress included within the Act a "special circumstances" exception. H.R. REP. No. 1418, *supra* note 3, at 4990. The special circumstances exception gives an adjudicative officer discretion to deny awards when equitable considerations mitigate against an award of fees. *Id.* For instance, an adjudicative officer may reduce or deny an award of fees when a party seeking a fee award unreasonably protracted the adjudicative proceeding and thus delayed resolution of the matter in controversy. 5 U.S.C. § 504(a)(3) (Supp. V 1981).

To recover a fee award, a party must submit within 30 days of a final disposition in the adversary adjudication an application to the administrative law judge presiding at the adjudication which states that the party is a prevailing party and is eligible to receive an award under the Act. *Id.* § 504(a)(2). The application must itemize the fees and expenses the party seeks to recover and must allege that the position of the agency at the adversary adjudication was not substantially justified. *Id.* The adjudicative officer of the agency who presided at the adversary adjudication may deny, reduce, or award the fees that a party seeks to recover. *Id.* § 504(a)(3). While a party dissatisfied with the adjudicative officer's fee award may petition to appeal the fee award to the federal court that has jurisdiction to review the merits of the underlying decision of the agency adjudication, the adjudicative officer may deny the petition to appeal after which a party may take no further appeal. *Id.* § 504(c)(2). After an administrative law judge or court

Section 2412 of the Act allows eligible parties[11] who prevail in civil actions against the federal government[12] to recover fees and expenses[13] irrespective of whether the party or the government brought the underlying action.[14] The Act provides that courts will award fees and expenses to parties who have prevailed in civil litigation against the government unless the court finds that the government's position was substantially justified or that special circumstances make an award unjust.[15] Congress designed the Act to balance the litigation resources available to parties and to the government[16] and to insure that parties base the decision to contest government actions on the merits of the case rather than on the cost of litigation.[17] In *Tyler Business Services,*

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has determined that a party is entitled to an award of fees, agencies will pay fee awards from any funds that are available to the agency. *Id.* § 504(d)(1).

11. *See supra* note 4 (parties eligible under Act).

12. *See supra* note 5 (prevailing parties within meaning of Act). The Act's references to the United States or the government includes any federal agency and any official of the United States acting in his or her official capacity. 28 U.S.C. § 2412(d)(2)(c) (Supp. V. 1981).

13. *See* 28 U.S.C. 2412(d)(2)(A) (Supp. V 1981). The Act defines fees and expenses to include the expense of expert witnesses, the cost of any study or analysis, and attorney fees that the court finds to be reasonable and necessary for the party's case against the government. *Id.* The Act, however, will not compensate attorneys at a rate in excess of $75 per hour or expert witnesses at a rate in excess of the highest rate of compensation for government witnesses. *Id.*

14. *See id.* § 2412(d)(1)(A). Parties formerly could recover attorney fees against the United States only in accordance with specific statutory authorization. 28 U.S.C. § 2412 (1976), *amended by* 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981); *see* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260-61 n.33 (1975) (list of statutes specifically authorizing parties to recover attorney fees). The Act thus constitutes a federal exception to the "American rule" which holds that prevailing litigants may not collect attorney fees from losing parties. *See* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (general practice of United States is in opposition to inclusion of attorney fees as damages absent express statutory authorization). The Supreme Court, however, has reaffirmed the American rule by holding that absent authorizing statutes litigants must pay their own attorney fees. *See* F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 129-31 (1974) (parties must address to Congress arguments for departure from American rule); Hall v. Cole, 412 U.S. 1, 4 (1973) (American rule disfavors allowance for attorney fees absent statutory authorization); *see also* Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 648-55 (1974) (criticizing American rule).

15. *See* 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981). A party seeking a fee award must within 30 days of a final judgment submit to the court an application which states that the party is a prevailing party and eligible to receive an award under the Act. *Id.* § 2412(d)(1)(B). The application must itemize the fees and expenses the party seeks to recover and must allege that the position of the Untied States in the underlying judicial proceeding was not substantially justified. *Id.* § 2412(d)(1)(B).

16. 5 U.S.C. § 504 note (Supp. V 1981) (congressional finding that government possesses greater legal expertise and resources than individuals). Congress determined that the standard for an award of fees against the United States should be different from the standard governing fee awards against private litigants because of the government's greater resources and expertise. *Id.* The disparity between the resources and expertise of individuals and their government magnifies the economic deterrent to contesting governmental action. H.R. REP. No. 1418, *supra* note 3, at 4984 (Act reduces economic disparity between government and individuals by entitling certain parties to recover litigation costs); *see* 126 CONG. REC. H. 10219 (daily ed. Oct. 1, 1980) (remarks of Rep. McDade) (Act balances scales of justice for first time in decades).

17. 5 U.S.C. § 504 note (Supp. V 1981). The expense of securing the vindication of rights may deter certain individuals and organizations from defending against unreasonable govern-

Inc. v. NLRB,[18] the Fourth Circuit recently granted civil litigation costs to a party who had prevailed against the National Labor Relations Board (NLRB or Board) during a proceeding before an administrative law judge and during civil litigation before the Fourth Circuit.[19]

In *Tyler*, the Regional Director of the Board (Director) alleged in his complaint against Tyler Business Services, Inc. that Tyler's discharge of Burton Lane, an employee, was wrongful and violated the National Labor Relations Act (NLRA).[20] The Director accused Tyler of terminating Lane's employment for comments Lane allegedly made while on a date with an important Tyler customer.[21] An administrative law judge dismissed the Director's wrongful discharge claim for lack of proof.[22] The NLRB, which reviews administrative hearing rulings, rejected the administrative law judge's finding with respect to the Director's determination on the wrongful discharge claim and held that Tyler's dismissal of Lane for remarks that Lane allegedly made violated the NLRA because the remarks were "protected concerted activity."[23] The Board ordered Tyler to take certain affirmative actions including the reinstatement

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mental action. *Id.* In allowing for fee awards, the Act provides an alternative to complying with unreasonable governmental action or to litigating against the government to a party's financial detriment. H.R. REP. No. 1418, *supra* note 3, at 4991.

18. 695 F.2d 73 (4th Cir. 1982).

19. *Id.* at 77.

20. Tyler Business Serv., 256 N.L.R.B. 567, 570 (1981). The Regional Director of the National Labor Relations Board (NLRB or Board) issued a complaint on February 13, 1980, alleging that Tyler's firing of Lane violated § 8(a)(1) and § 8(a)(3) of the National Labor Relations Act (NLRA). *Id.; see* 29 U.S.C. § 158(a)(1), (3) (1976). The NLRA provides that it is illegal for an employer to interfere with or restrain an employee's right to engage in bargaining activities for the mutual benefit of employees. *Id.* § 158(a)(1). The NLRB complaint also charged that Tyler violated § 8(a)(1) of the NLRA by threatening on two occasions to fire employees if the employees chose union representation. 256 N.L.R.B. at 570; *see* 29 U.S.C. § 158(a)(1) (1976) (employer may not discourage membership in labor organization).

21. 256 N.L.R.B. at 571-73. With respect to the Board's determination that Lane's conversation with a Tyler customer constituted protected concerted activity, Lane's comments to the Tyler customer consisted of a rumored romantic affair involving Tyler's president and Lane's personal concern that Tyler's part-time employees did not receive hospitalization benefits. *Id.* at 571.

22. *Id.* at 572-73. In considering the Board's allegation that Tyler violated the NLRA by threatening to fire employees if they chose union representation, the administrative law judge dismissed the Board's complaint for lack of proof. *Id.* at 573. The NLRB affirmed the administrative law judge's findings to the extent that Tyler had not violated the NLRA by threatening to fire employees for choosing union representation. *Id.* at 567-68. With respect to the Board's allegation that Tyler fired Lane for engaging in protected concerted activity, the administrative law judge similarly dismissed the Board's complaint for lack of proof and held that Lane had not engaged in concerted activity while speaking to Tyler's customer. *Id.* at 573; *see infra* note 23 and accompanying text (NLRB, however, overruled administrative law judge's findings with respect to wrongful discharge claim and held that Tyler violated NLRA by firing Lane for engaging in protected concerted activities).

23. 256 N.L.R.B. at 567-69. The Board held that Tyler violated § 8(a)(1) of the NLRA by terminating Lane for comments Lane made while on a date with a Tyler customer. *Id.; see* 29 U.S.C. § 158(a)(1) (1976) (employer may not interfere with employee's right to engage in activities for mutual benefit of employees). While the majority of Lane's conversation with the Tyler customer was of a personal nature, Lane had stated that Tyler treated part-time employees unfairly by not providing them hospitalization benefits. 256 N.L.R.B. at 571; *see supra* note 21 (Lane's con-

of Lane.[24] Tyler thereafter petitioned the Fourth Circuit to review the Board's finding that Tyler had violated the NLRA by discharging Lane for engaging in protected concerted activity.[25] The NLRB, in response to Lane's petition for review of the Board's findings, cross-petitioned the Fourth Circuit for enforcement of the Board's order requiring the reinstatement of Lane.[26] The Fourth Circuit held, however, that the Board's evidence that Lane had attempted to benefit Tyler employees through conversation with the Tyler customer was insufficient to sustain a finding that Lane was engaged in protected concerted activity.[27] Initially, the Fourth Circuit found that protected concerted activity is activity that involves an employee's attempt to enforce a bargaining agreement, to induce group action, or to act on behalf of other employees.[28] Based on Lane's testimony before the administrative law judge that he was not attempting to enlist the customer's aid or sympathy on behalf of Tyler employees,[29] the Fourth Circuit concluded that the record did not

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versation with customer). The Board stated that Lane's comment concerning part-time employee hospitalization benefits did not lose its protection under the NLRA either because the comment was unfounded or because Lane's other comments to the Tyler customer might have embarrassed Lane's employer. 256 N.L.R.B. at 568. The Board held that because Lane expressed his concern that Tyler's hospitalization benefits did not extend to part-time employees, Lane's expression was protected concerted activity within the meaning of the NLRA. *Id.* at 567-68; *see* Community Hosp. of Roanoke Valley v. NLRB, 538 F.2d 607, 610 (4th Cir. 1976) (NLRA protects statements directly related to concerted activities); 29 U.S.C. § 158(a)(1) (1976) (employer may not discharge employee for engaging in activity that contemplates employees' aid or protection). *But see infra* notes 28-30 (Lane stated that he did not make statements to Tyler customer with intention of benefitting Tyler employees).

24. *Tyler Business Serv.*, 256 N.L.R.B. at 568-69. Tyler had offered to reinstate Lane on February 11, 1980, two days before the Board's Regional Director issued a complaint against Tyler. *Id.* at 570. Lane accepted Tyler's offer of reinstatement. *Id.* In addition to requiring reinstatement of Lane, the Board's order also required Tyler to make Lane whole for any loss of earnings and to make available to the Board company records concerning Lane's back pay. *Id.* at 569-70. Finally, the Board's order required Tyler to post notices which stated that Tyler had violated the NLRA by discharging an employee for engaging in protected concerted activity. *Id.; see* 29 U.S.C. § 158(a)(3) (1976) (employer may not discriminate against employees for engaging in conduct that contemplates group action).

25. Tyler Business Serv. v. NLRB, 680 F.2d 338, 339 (4th Cir. 1982).

26. *Id.; see supra* note 24 (present litigation concerns requirements of Board's order other than Lane's reinstatement).

27. 680 F.2d at 339. In finding insufficient evidence to support the Board's finding that Tyler violated the NLRA by discharging Lane for engaging in concerted activity, the Fourth Circuit noted that Lane had no recollection of discussing hospitalization benefits with the Tyler customer. *Id.; see* 29 U.S.C. § 158(a)(1) (1976) (NLRA protects employee's activities that contemplate group action or mutual benefit); *infra* notes 28-30 and accompanying text (no evidence of Lane's involvement in activities for mutual benefit of employees).

28. 680 F.2d at 339. Since Lane stated that he had not intended to benefit Tyler employees in speaking to the Tyler customer, the Fourth Circuit held that an employee's expression of personal concerns must contemplate group action or mutual benefit to constitute concerted activity. *Id.; see* Blaw-Knox Foundry & Mill Mach. Inc. v. NLRB, 646 F.2d 113, 116 (4th Cir. 1981) (employee does not engage in concerted activity by manifesting personal concern).

29. 680 F.2d at 339; *see* Tyler Business Serv., 256 N.L.R.B. 567, 573 (1981) (administrative law judge's finding that Lane made comments to customer of Tyler with intention of maligning Tyler's president and not of helping company employees).

support the Board's position that Tyler discharged Lane for engaging in protected concerted activity.[30] Following the Fourth Circuit's denial of the Board's order requiring Tyler to reinstate Lane, Tyler petitioned the Fourth Circuit to recover attorney fees and expenses that he had incurred in both the administrative and civil proceedings pursuant to the Act.[31] While the Fourth Circuit awarded Tyler the fees and expenses he had incurred during litigation before the Fourth Circuit, the court denied Tyler the fees and expenses that he had incurred in preparation for an NLRB hearing before an administration law judge.[32]

In deciding to award Tyler attorney fees that he had incurred in civil litigation before the Fourth Circuit, the Fourth Circuit examined whether the Board's "position was substantially justified"[33] within the meaning of the Act.[34] Under the Act, Tyler could recover fees and expenses only if the Board's position was not substantially justified.[35] The Fourth Circuit noted that during the NLRB's review of the administrative law judge's disposition of Lane's wrongful discharge claim, the NLRB had ignored Lane's testimony that he had not engaged in protected concerted activity while speaking to the Tyler customer.[36] The Fourth Circuit thus determined that the Board's position was not substantially justified because the NLRB had failed to present a reasonable factual

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30. 680 F.2d at 339. Significant to the Fourth Circuit's denial of the Board's order requiring the reinstatement of Lane was Lane's testimony that he had not attempted to enlist the customer's aid or sympathy in making comments about Tyler Business Services. *Id.; see supra* notes 23 & 28 (concerted activity must contemplate group action or mutual benefit and may not be of purely personal nature).

31. Tyler Business Serv. v. NLRB, 695 F.2d 73-74 (4th Cir. 1982). To recover a fee award under the Act, a party must within 30 days of a final disposition in an agency or civil proceeding submit an application to the court which states that the party is a prevailing party and eligible to receive an award of fees. *See* 5 U.S.C. § 504(a)(2) (Supp. V 1981). (procedure for recovering fees from government agency); 28 U.S.C. § 2412(d)(1)(B) (Supp. V 1981) (procedure for recovering fees from government in civil proceedings); *supra* notes 10 & 15 (summary of procedures for recovering fees following agency and civil adjudications).

32. 695 F.2d at 76-77. The Fourth Circuit stated that the effective date of the Act barred Tyler's recovery of fees that Tyler had incurred in preparation for the NLRB administrative proceeding. *Id.* at 77; *see infra* note 75 and accompanying text (Fourth Circuit denied expenses relating to NLRB administrative proceeding because agency proceeding concluded prior to effective date of Act).

33. 5 U.S.C. § 504(a)(1) (Supp. V 1981); 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981); *see supra* note 9 (substantially justified standard is essentially test of reasonableness).

34. 695 F.2d at 75.

35. *See* 5 U.S.C. § 504(a)(1) (Supp. V 1981) (parties may recover litigation costs from federal agency if agency cannot substantially justify agency conduct); 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981) (parties may recover litigation costs from government if government's litigation position is not substantially justified).

36. 695 F.2d at 76. In determining that Tyler had not violated the NLRA by terminating Lane for comments Lane made to a Tyler customer, the Fourth Circuit stated that the Board's general counsel had not offered a reasonable explanation for Lane's disclaimer of involvement in concerted activity. *Id.; see* 29 U.S.C. § 158(a)(3) (1976) (illegal to discharge employee for engaging in union activity).

basis for alleging that Tyler discharged Lane for engaging in protected concerted activity.[37]

In determining that the NLRB's position that Tyler terminated Lane for engaging in protected concerted activity was not substantially justified, the Fourth Circuit considered whether the Act refers to the government's position at the agency level or the government's position in subsequent civil litigation.[38] The Fourth Circuit concluded that the Act refers to the government's position as a party at whatever adversary proceeding, administrative or civil, for which a litigant seeks to recover related fees and expenses.[39] Accordingly, Tyler was eligible to recover fees and expenses that he had incurred at both the NLRB and Fourth Circuit proceedings since the Board could not prove at either the NLRB or Fourth Circuit proceedings that Lane had been engaged in protected concerted activity.[40] Despite Lane's eligibility to recover fees and expenses relating to the NLRB proceeding, the Fourth Circuit denied recovery of fees that Tyler incurred at the NLRB proceeding because the NLRB proceeding concluded prior to the effective date of the Act.[41] The Fourth Circuit thus awarded Tyler only the fees that he had incurred during litigation before the Fourth Circuit.[42] In addition, the Fourth Circuit noted that Tyler's recovery also could include fees that Tyler had incurred in preparing and prosecuting the motion for attorney fees.[43]

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37. 695 F.2d at 76; *see supra* note 30 (Lane had denied involvement in concerted activity while speaking to Tyler customer).

38. 695 F.2d at 75. In determining whether the government's position wa substantially justified, the *Tyler* court did not need to determine whether the Act focuses on the government's position during agency level proceedings or the government's position in subsequent civil litigation. *See* Goldhaber v. Foley, 698 F.2d 193, 196 (3d Cir. 1983) (court need not resolve which government position Act focuses upon unless government changes its position before or after complaint); Operating Eng'rs Local Union v. Bohn, 541 F. Supp. 486, 495 (C.D. Utah 1982) (distinction between which government position court should focus on in determining if government's position was substantially justified becomes important only when agency changes its position). In *Tyler*, the Board's position did not change from the Board's original complaint to the subsequent Fourth Circuit litigation. *Compare* Tyler Business Serv., 256 N.L.R.B. 567, 570 (1981) (Regional Director's complaint that Tyler fired Lane for engaging in protected concerted activity) *with* Tyler Business Serv. v. NLRB, 680 F.2d 338, 339 (4th Cir. 1982) (Board finding that Tyler violated NLRA by firing Lane for engaging in protected concerted activity).

39. Tyler Business Serv. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982).

40. *Id.* at 76 (Tyler sought recovery of fees that he had incurred at administrative proceedings before Board in addition to expenses of litigation against NLRB before Fourth Circuit). *But see infra* note 41 and accompanying test (effective date of Act bars recovery of Tyler's agency proceeding expenses).

41. 695 F.2d at 77. The Act applies to adversary adjudications and civil actions pending on or commencing after October 1, 1981. 5 U.S.C. § 504 note (Supp. V 1981). The Fourth Circuit did not award expenses relating to the administrative hearing because Tyler's proceedings before the NLRB concluded on August 17, 1981. 695 F.2d at 77; *see* 5 U.S.C. § 504 note (Supp. V 1981) (effective date of Act is October 1, 1981); *infra* notes 74-76 and accompanying text (agency adjudication and subsequent civil litigation are not same continuous proceeding for purpose of determining whether case was pending on Act's effective date).

42. 695 F.2d at 77; *see supra* note 13 (Act limits fee recovery).

43. 695 F.2d at 77. *But see supra* notes 10 & 15 and accompanying text (court has discre-

The Fourth Circuit was correct in awarding attorney fees and expenses to Tyler because the NLRB failed to present evidence to support the Board's complaint that Tyler fired Lane for engaging in protected concerted activity.[44] Since Lane denied at the administrative hearing that he had engaged in concerted activity while speaking to the Tyler customer, the Board's position that Lane had engaged in protected concerted activity was not substantially justified at either the administrative or the judicial levels.[45] Notwithstanding a possible labor-related conversation between Lane and the Tyler customer, the Fourth Circuit previously has held that when an employee acts on a matter of personal concern without the intention of benefitting a group, the employee is not engaged in protected concerted activity within the meaning of the NLRA.[46] Other circuits that have ruled on the issue of protected concerted activity support the Fourth Circuit in holding that an employee must seek to enforce a bargaining agreement or to induce group action to constitute protected activity within the meaning of the NLRA.[47]

To the extent that evidence does not appear in the record to support the Board's allegation that Tyler fired Lane for engaging in protected concerted

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tion to reduce or deny fee award if special circumstances make award unjust).

44. *See* 695 F.2d at 76 (NLRB failed to refute Lane's testimony that he was not engaged in protected concerted activity while on date with Tyler's customer); Tyler Business Serv. v. NLRB, 680 F.2d 338, 339 (4th Cir. 1982) (insufficient evidence that Lane engaged in concerted action while speaking to Tyler's customer); Tyler Business Serv., 256 N.L.R.B. 567, 573 (1981) (Lane made comments to Tyler's customer to malign Tyler and not to benefit company employees); *supra* note 15 (court will award fees to prevailing parties when government's litigation position was not substantially justified).

45. *See* Tyler Business Serv. v. NLRB, 680 F.2d 338, 339 (4th Cir. 1982) (record lacks evidentiary support for Board ruling that Tyler discharged Lane for engaging in protected concerted activity); Tyler Business Serv., 256 N.L.R.B. 567, 573 (1981) (NLRB failed to prove allegation that Tyler fired Lane for engaging in protected concerted activity).

46. *See* Blaw-Knox Foundry & Mill Mach. Inc. v. NLRB, 646 F.2d 113, 115-16 (4th Cir. 1981). In *Blaw-Knox Foundry & Mill Mach., Inc. v. NLRB*, the Fourth Circuit held that when an employee's altercation with his employer manifests a purely personal concern, evidence does not support a finding that an employer violated the NLRA by discharging an employee for engaging in protected concerted activity. *Id.* at 116. In *Krispy Kreme Doughnut Corp. v. NLRB*, the Fourth Circuit held that the Board failed to establish that an employer violated the NLRA by firing an employee for engaging in protected concerted activity when an employee's action did not intend or contemplate group action. 635 F.2d 304, 310 (4th Cir. 1980).

47. *See* Ontario Knife Co. v. NLRB, 637 F.2d 840, 844-46 (2d Cir. 1980) (employer did not violate NLRA in discharging employee because employee's actions did not contemplate group action); Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 28-29 (7th Cir. 1980) (employer's actions must contemplate group activity to constitute concerted activity); ARO, Inc. v. NLRB, 596 F.2d 713, 718 (6th Cir. 1979) (employee's complaint must have object of inducing group action to amount to concerted action); Randolph Division, Ethan Allen, Inc. v. NLRB, 513 F.2d 706, 708 (1st Cir. 1975) (employee's conduct must appear with object of inducing group action to be concerted activity); NLRB v. Buddies Supermarkets, Inc., 481 F.2d 714, 718 (5th Cir. 1973) (concerted activity must appear with object of initiating or inducing group action); NLRB v. Selwyn Shoe Mfg. Corp., 428 F.2d 217, 221 (8th Cir. 1970) (concerted activities include exercise of rights that appear in collective bargaining agreement); Mushroom Transp. Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964) (employee who spoke to other employees concerning their rights but without contemplation of group action did not engage in concerted activity).

activity, *Tyler* is similar to *Wolverton v. Schweiker*.[48] In *Wolverton*, the Secretary of Health and Human Services (Secretary) denied disability benefits to a claimant because the Secretary alleged that the claimant was capable of light and sedentary jobs.[49] The United States District Court for the District of Idaho in *Wolverton* held that the Secretary's denial of disability benefits to the claimant was not substantially justified because no evidence appeared in the record to suggest that the plaintiff was capable of light and sedentary jobs.[50] The *Wolverton* court thus awarded the claimant attorney fees and expenses pursuant to the Act.[51] Similarly, because the Fourth Circuit in *Tyler* found no evidence in the record to support the Board's determination that Lane had engaged in protected concerted activity while speaking to the Tyler customer, the Board's position that Tyler terminated Lane for engaging in protected concerted activity was not substantially justified and therefore the Act entitled Tyler to recover litigation costs from the NLRB.[52]

The Third Circuit in *Natural Resources Defense Council v. EPA*[53] criticized the *Tyler* court for focusing exclusively on the NLRB's civil litigation position in finding that the NLRB's position that Tyler fired Lane for engaging in protected concerted activities was not substantially justified.[54] In determining

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48. 533 F. Supp. 420 (D. Idaho 1982).

49. *Id.* at 425.

50. *Id.* In denying social security disability benefits to a claimant, an administrative law judge in *Wolverton v. Schweiker* had relied on a vocational consultant's answer to a hypothetical question to find that the claimant could perform certain light and sedentary jobs. *Id.* The United States District Court for the District of Idaho in *Wolverton* found, however, no evidence in the record to support the administrative law judge's finding that the claimant was capable of light and sedentary jobs. *Id.*

51. *Id.* at 425-26. In finding that the Secretary of Health and Human Services had not substantially justified his position that a plaintiff was capable of light and sedentary jobs, the *Wolverton* court awarded those attorney fees the plaintiff had incurred in civil litigation before federal district court. *Id.* at 426; *see* 28 U.S.C. § 2412(d)(1)(A) (Supp. V 1981) (court may award prevailing parties fees and expenses of litigation if government's position was not substantially justified). The *Wolverton* court, however, did not award fees that the claimant had incurred in an underlying social security administrative hearing because the Act does not cover agency adjudications in which counsel do not represent the government's position during the adjudicative proceeding. 533 F. Supp. at 424; *see* H.R. REP. No. 1434, *supra* note 3, at 5012 (social security hearings are not adversary adjudications because counsel do not represent government during adjudication).

52. *Compare* Wolverton v. Schweiker, 533 F. Supp. 420, 425-26 (D. Idaho 1982) (when record lacked any factual evidence to support government's position, government's position was not substantially justified) *with* Tyler Business Serv. v. NLRB, 695 F.2d 75, 76 (4th Cir. 1982) (since NLRB presented no evidence that Tyler fired Lane for engaging in protected concerted activity, Board's position was not substantially justified).

53. 703 F.2d 700 (3d Cir. 1983).

54. *Id.* at 706. The Third Circuit in *Natural Resources Defense Council, Inc. v. EPA* may have confused the Fourth Circuit's holding in *Tyler* with the holdings of the Fifth and District of Columbia Circuits that focused exclusively on the government's civil litigation position in determining whether the government's position was substantially justified. *See* Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1390-91 (Fed. Cir. 1982) (Act's substantially justified standard focuses on government's civil litigating position and not on government's administrative hearing position); S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n,

that the Environmental Protection Agency's postponement of amendments to the Clean Water Act[55] was not substantially justified, the *Natural Resources* court held that for purposes of determining whether the government's position was substantially justified a court should focus on the government's position at the agency level rather than on the government's position in subsequent civil litigation.[56] The *Natural Resources* court stated that the *Tyler* court's focus on the government's civil litigation position would mean that no matter how outrageously an agency had acted during an administrative hearing, the Act would not apply so long as the agency conducted itself reasonably in subsequent civil litigation.[57] The Third Circuit in *Natural Resources* misconstrued, however, not only the Fourth Circuit's holding in *Tyler* but also the terms of the Act.[58]

In reasoning that the NLRB had not substantially justified its position, the Fourth Circuit in *Tyler* did not focus exclusively on the NLRB's civil litigation position as the *Natural Resources* court suggested.[59] Rather, the *Tyler* court focused correctly on both the NLRB agency and litigation positions in determining whether the NLRB's position was substantially justified.[60] The terms of the Act[61] as well as the Act's legislative history[62] clearly indicate that

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672 F.2d 426, 430-31 (5th Cir. 1982) (court focused exclusively on government's civil litigation position in determining whether government's position was substantially justified); *supra* text accompanying note 39 (Fourth Circuit focused on both government's civil litigating position and agency position in determining whether government's position was substantially justified).

55. 33 U.S.C. § 1317 (1976 & Supp. V 1981).

56. 703 F.2d 700, 707 (3d Cir. 1983). In finding that the EPA could not substantially justify its failure to establish standards for pollutants in treatment works, the *Natural Resources* court interpreted the Act's substantially justified standard to focus on agency actions that require a party to file suit. *Id.; see* 33 U.S.C. § 1317(b)(1) (1976 & Supp. V 1981) (procedure for establishing pollutant standards).

57. 703 F.2d at 706-07.

58. *Cf. infra* notes 60-63 and accompanying text (Fourth Circuit correctly interpreted Act to refer to both agency conduct and government's litigating position in determining whether government's position was substantially justified).

59. *See* Tyler Business Serv. v. NLRB, 695 F.2d 73, 75-76 (4th Cir. 1982) (Fourth Circuit interpreted Act's substantially justified standard to refer to agency level proceedings and proceedings on judicial review).

60. *See id.; infra* notes 61-64 and accompanying text (Fourth Circuit's focus on government's position at whichever level party seeks to recover fees was correct interpretation of Act).

61. *See* 5 U.S.C. § 504(a)(1) (Supp. V 1981). Agencies may award prevailing parties fees and expenses unless an adjudicative officer finds that the government's position was substantially justified. *Id.* Courts reviewing underlying agency adjudications may award fees and expenses pursuant to the Act. *Id.* § 504(c)(1). A court may award reasonable fees and expenses of attorneys to prevailing parties in any civil action that a party brings against the government or against any federal agency or government official acting in his or her official capacity. *See* 28 U.S.C. § 2412(b) (Supp. V 1981); *supra* notes 10 & 15 (Act's procedures for recovering fees in agency adjudication and civil litigation).

62. *See* H.R. REP. No. 1418, *supra* note 3, at 4987-88. The Act permits courts to award attorney fees and expenses that parties incur in civil litigation against the government if the court finds the government's position was not substantially justified. *Id.* The Act also permits parties who prevail in adversary adjudications to recover fees and expenses if the agency's position was not substantially justified. *Id.* at 4988-89. The Act specifically allows for the payment of attorney

for purposes of determining whether the government's position was substantially justified, the Act applies to both an agency's actions during administrative proceedings and an agency's position during subsequent civil proceedings.[63] The Third Circuit's exclusive focus in *Natural Resources* on agency level proceedings would allow an agency to avoid liability under the Act for a civil litigation position that was not substantially justified so long as the agency had conducted itself reasonably during prior agency adjudicative proceedings.[64] In contrast, for purposes of determining whether the NLRB's position was substantially justified, the Fourth Circuit correctly interpreted the Act to refer to the government's position as a party at whatever level proceeding a court or agency reviews for the purpose of granting a fee award.[65]

In holding that the Act refers to both the government's position in administrative proceedings and in subsequent litigation, the District of Columbia Circuit in *Photo Data, Inc. v. Sawyer*[66] supported the Fourth Circuit's holding in *Tyler*.[67] The *Photo Data* court considered whether the Government Printing Office's refusal to grant a contract to a party whose bid had been the lowest constituted unreasonable governmental conduct within the meaning of the Act.[68] In finding that the Government Printing Office could not substantially justify its position denying the contract to the lowest bidder, the

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fees to parties who prevail in civil actions against the government. H.R. REP. No. 1434, *supra* note 3, at 5014. The Act also requires a federal agency to award prevailing parties fees and expenses unless the agency's adjudicative officer finds that the agency's position was substantially justified. *Id.* at 5010.

63. *See* Tyler Business Serv. v. NLRB, 695 F.2d 73, 75 (4th Cir. 1982). In interpreting the Act to refer to the government's position as a party in prosecuting or defending the litigation at whichever level proceeding is under review for an award of fees, the Fourth Circuit compromises the position of courts that focus exclusively on the government's civil litigating posture and the position of courts that focus exclusively on the agency's conduct. *See id. Compare* Natural Resources Defense Council v. EPA, 703 F.2d 700, 706 (3d Cir. 1983) (Act focuses on underlying agency conduct) *with* Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1390-91 (Fed. Cir. 1982) (Act focuses exclusively on government's position in civil litigation) *and* S&H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Comm'n, 672 F.2d 426, 430-31 (5th Cir. 1982) (Act focuses on government's civil litigating position).

64. *See* Natural Resources Defense Council v. EPA, 703 F.2d 700, 706-07 (3d Cir. 1983) (court stated that exclusive focus on government's litigation position during civil proceedings would permit agency to engage in improper conduct during administrative proceeding and avoid liability under Act); *supra* notes 61-63 and accompanying text (Fourth Circuit properly construed Act to refer to both agency's conduct and government's position in civil litigation).

65. *See supra* notes 61-63 and accompanying text (Congress intended Act's substantially justified standard to refer to government's position during both agency and civil proceedings).

66. 533 F. Supp. 348 (D.D.C. 1982).

67. *Id.* at 352; *see supra* note 39 and accompanying text (*Tyler* court held that Act's substantially justified standard referred to government's position at whichever level of proceeding party sought to recover fees).

68. 533 F. Supp. at 352-53. In *Photo Data v. Sawyer*, the United States District Court for the District of Columbia stated that the Government Printing Office's (GPO) rejection of a party's low bid for a contract on which the GPO had invited the party to bid was the sort of conduct Congress intended the Act to prevent. *Id.; see supra* notes 1 & 2 and accompanying text (Act provides incentive to contest unreasonable governmental conduct).

Photo Data court stated that a court must consider both the government's agency position and the government's subsequent civil litigation position in determining whether the government's position was substantially justified.[69] The Fourth Circuit in *Tyler* similarly interpreted the Act to refer to both the government's conduct during agency proceedings and the government's subsequent litigation position in determining whether the government's position was substantially justified.[70] No other circuit has addressed whether a court should review both the government's conduct during agency proceedings and the government's position during civil litigation in determining whether the government's position was substantially justified within the meaning of the Act.[71]

In addition to determining that the Act refers to the government's position during both administrative and civil proceedings, the Fourth Circuit resolved which attorney fees the Act entitles a plaintiff to recover.[72] Government agencies have argued that the Act does not entitle a party to recover fees that a party incurred prior to the Act's effective date.[73] The Fourth Circuit correctly construed the Act, however, to apply to fees and expenses that parties incur in connection with cases pending on the Act's effective date.[74]

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69. 533 F. Supp. at 352-53. In refusing the party's low bid in *Photo Data*, the GPO's Contracting Officer had relied on a GPO finding that Photo Data, Inc. was irresponsible. *Id.* at 349. On review, the *Photo Data* court found that the GPO's position was not substantially justified because the GPO could not substantiate its finding that Photo Data was irresponsible. *Id.* at 351.

70. *See supra* notes 39-40 & 61-63 and accompanying text (Fourth Circuit correctly interpreted Act to focus on both agency's actions and government's litigating position).

71. *But see Broad Ave. Laundry & Tailoring v. United States*, 693 F.2d 1387, 1390 (Fed. Cir. 1982). In *Broad Ave.*, the District of Columbia Circuit interpreted the Act's substantially justified standard to refer exclusively to the government's civil litigation position as opposed to the government's position in prior administrative proceedings. *Id. Broad Ave.* is distinguishable from the present case,however, in that the plaintiff in *Broad Ave.* sought attorney fees attributable only to subsequent civil proceedings whereas Tyler sought to recover attorney fees that he had incurred during both administrative and subsequent civil proceedings. *Id.; see* Tyler Business Serv. v. NLRB, 695 F.2d 73, 76-77 (4th Cir. 1982) (Tyler claimed attorney fees that he incurred during proceedings before both NLRB and Fourth Circuit).

72. *See infra* notes 73-75 and accompanying text (case must be pending on Act's effective date for party to recover fees).

73. *See* United States v. Citizens State Bank, 668 F.2d 444, 446 (8th Cir. 1982) (Internal Revenue Service argued that expenses party incurred prior to effective date of Act were not recoverable); Underwood v. Pierce, 547 F. Supp. 256, 260-61 (C.D. Cal. 1982) (counsel for Housing & Urban Development Administration argued that Act precluded party from recovering fees for work performed prior to effective date of Act); Shumate v. Harris, 544 F. Supp. 779, 782-83 (W.D.N.C. 1982) (Secretary of Health and Human Services argued that party may not recover expenses attributable to period before Act's effective date); Photo Data, Inc. v. Sawyer, 533 F. Supp., 348, 350-51 (D.D.C. 1982) (Government Printing Office sought to limit party's recovery to fees that party incurred prior to Act's effective date).

74. *See* United States v. Citizens State Bank, 668 F.2d 444, 446 (8th Cir. 1982) (fees that party incurred prior to Act's effective date are recoverable so long as case was pending on Act's effective date); Underwood v. Pierce, 547 F. Supp. 256, 260-61 (C.D. Cal. 1982) (courts consistently have approved awards of attorney fees for work that attorneys performed prior to effective date of recovery acts); Shumate v. Harris, 544 F. Supp. 779, 782-83 (W.D.N.C. 1982) (Act's effective date does not bar award of fees if case was pending on effective date); Wolverton v. Schweiker, 533 F. Supp. 420, 423 (D. Idaho 1982) (plain meaning of Act is contrary to notion

The Fourth Circuit was correct in denying Tyler fees and expenses that he had incurred during the NLRB administrative proceedings, however, because the NLRB administrative proceedings concluded prior to the effective date of the Act and therefore were not pending on the Act's effective date.[75] In *S & H Riggers & Erectors, Inc. v. Occupational Safety & Health Review Commission*,[76] the Fifth Circuit, like the *Tyler* court, declined to view proceedings on appeal as mere continuations of agency adversary adjudications for the purpose of determining whether the case was pending on the effective date of the Act.[77] No other court has ruled to the contrary.[78]

In *Tyler*, a party who prevailed at an NLRB administrative hearing petitioned the Fourth Circuit to recover his litigation costs and expenses pursuant to the Equal Access to Justice Act.[79] The Fourth Circuit correctly held that the party could recover attorney fees connected with civil litigation before the Fourth Circuit.[80] The *Tyler* court was also correct in holding that the effective date of the Act barred the recovery of fees that Tyler had incurred during administrative proceedings before the NLRB.[81] The Fourth Circuit's decision

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that party may not recover fees that party incurred prior to Act's effective date); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 350-51 (D.D.C. 1982) (to construe Act to bifurcate cases on Act's effective date would eschew purpose of Act).

75. *See* 5 U.S.C. § 504 note (Supp. V 1981). Section 208 of the Act states that the Act shall apply to any adversary adjudication or civil action pending on or commenced on or about October 1, 1981. *Id.* Tyler's proceedings before the Board concluded on August 17, 1981, when the Board denied Tyler's motion for reconsideration. Tyler Business Serv. v. NLRB, 695 F.2d 73, 77 (4th Cir. 1982). Because the Act clearly distinguishes between administrative hearing proceedings and civil proceedings on judicial review, Tyler's Board proceedings ended on August 17, 1981, before the Act took effect on October 1, 1981. *See* 5 U.S.C. § 504(c)(2) (Supp. V 1981) (adjudicative officer's denial of petition for appeal is final).

76. 672 F.2d 426 (5th Cir. 1982).

77. *Id.* at 428. The Fifth Circuit in *S&H Riggers & Erectors v. Occupational Safety & Health Review Comm'n* stated that an agency adversary adjudication on appeal on October 1, 1981, the effective date of the Act, is not pending on October 1, 1981, within the meaning of the Act. *Id.* Because the Act distinguishes between proceedings on the agency level and proceedings on appeal, the Fifth Circuit held that courts should not view agency and civil proceedings as a single continuing proceeding in determining whether a case is pending. *Id.; see* 28 U.S.C. § 2412(d)(3) (Supp. V 1981) (separate procedures for recovering fees in agency adjudications and civil proceedings); *supra* note 75 and accompanying text (Fourth Circuit correctly determined that Board proceeding was not pending on effective date of Act).

78. *See, e.g.*, Wolverton v. Schweiker, 533 F. Supp. 420, 423 (D. Idaho 1982) (civil action or adversary adjudication must be pending on Act's effective date for Act to apply); Berman v. Schweiker, 531 F. Supp. 1149, 1151 (N.D. Ill. 1982) (case no longer pending once period for appeal had expired); United States v. 319.46 Acres of Land More or Less, 508 F. Supp. 288, 291-92 (W.D. Okla. 1981) (effective date of Act barred recovery of fees in case decided prior to October 1, 1981).

79. *See supra* notes 23-25 and accompanying text (NLRB overruled administrative law judge's findings).

80. *See supra* notes 44-47 and accompanying text (NLRB did not substantially justify position that Tyler fired Lane for engaging in protected concerted activity).

81. *See supra* notes 75-78 and accompanying text (courts should not view agency and civil proceedings as single continuous proceeding in determining whether case was pending on Act's effective date).