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Scott Lars Rogers

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PILOTS DENIED RELIEF—BY NARROWLY CONSTRUING “PREVAILING PARTIES” UNDER THE EAJA, THE D.C. CIRCUIT ALLOWS THE FAA TO RUN AMOK

SCOTT LARS ROGERS*

IN TURNER v. National Transportation Safety Board, the D.C. Circuit held that pilots were not “prevailing parties” when the Federal Aviation Administration (FAA) withdrew a license-suspension complaint against two pilots before their appeal to an administrative law judge (ALJ).1 This strict application of “prevailing party” denied the pilots relief under the Equal Access to Justice Act (EAJA).2 The court defined “prevailing party” as a party that receives any judicial relief.3 In holding that the pilots were not prevailing parties, the court claimed that because the FAA withdrew its complaint, the parties were no longer adversaries, and the pilots and the FAA were left “where they were before the complaint was filed.”4 The D.C. Circuit’s holding is inequitable because the pilots were left worse off than they were prior to the FAA’s suspension action. The EAJA was available to shift fees and make the pilots whole, but the D.C. Circuit incorrectly denied recovery to the pilots, leaving them without remedy.5

The FAA suspended pilots Mark Turner and Stephen Coonan’s Airline Transport Pilot Certificates, alleging that the pilots operated an aircraft that was not airworthy.6 Turner and Coonan each appealed the suspension to an ALJ and were given

* J.D. Candidate, SMU Dedman School of Law, 2011; B.A., Southwestern University, 2008. The author thanks his parents, Charles and Candace, for their constant support and encouragement.

1 608 F.3d 12, 17 (D.C. Cir. 2010).
2 Id.
3 Id. at 15.
4 Id. at 16.
6 Turner, 608 F.3d at 13; 14 C.F.R. § 91.7(a) (2010) (stating that “No person may operate a civil aircraft unless it is in an airworthy condition.”).
hearings in June 2008 until motions to continue pushed the case back to August 2008.  

Shortly after the continuance of these cases, the FAA decided to withdraw its license-suspension action against each pilot. The FAA gave only a brief statement regarding its withdrawal, stating, "[t]he Administrator hereby withdraws its complaint in this matter." As a result, the ALJ dismissed the proceedings against the pilots and did not specify if the dismissal was with or without prejudice.

Turner and Coonan argued that they were "prevailing parties" and sought recovery for attorney's fees and expenses under the EAJA, which states:

An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust.

The ALJ agreed with the pilots' position that they had prevailed over the FAA and awarded the pilots attorney's fees and expenses. Specifically, the ALJ determined that due to the FAA's withdrawal, its position was not "substantially justified," and with this withdrawal the pilots prevailed. The ALJ explained that the FAA had "proceeded on a weak and tenuous basis with a flawed investigation bereft of any meaningful evidence."  

After this unfavorable ruling, the FAA appealed to the National Transportation Safety Board (NTSB), arguing that the ALJ had erred in finding that Turner and Coonan were prevailing parties. Faced with an issue of first impression, the NTSB relied on the civil action definition of "prevailing party" from Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources. The NTSB did not seize the

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7 Turner, 608 F.3d at 13.
8 Id.
9 Id.
10 Id. (the D.C. Circuit correctly interprets this unspecified dismissal by the ALJ to be a dismissal without prejudice).
12 Turner, 608 F.3d at 14.
13 Id.
14 Id.
15 Id.
opportunity to actually define "prevailing party" in the context of the instant case—agency adjudication.\textsuperscript{17} By relying on Buckhannon, the NTSB ignored the fundamental differences between civil action and agency adjudication.\textsuperscript{18} The NTSB, relying on Buckhannon, defined a prevailing party in agency cases as someone who "receive[d] an enforceable judgment on the merits of [his] case" or "obtain[ed] a court-ordered consent decree that resulted in a change in the legal relationship between the parties."\textsuperscript{19} Under this definition, the NTSB held that the pilots failed to meet the prevailing party standard.\textsuperscript{20} The NTSB came to this conclusion by finding that the pilots did not win on the merits. Specifically, the ALJ did not "issue an order akin to a court-supervised consent decree" because he "merely accepted" the FAA withdrawal, and the ALJ's dismissal was without prejudice, which left the relationship of the parties unaltered.\textsuperscript{21}

Turner and Coonan appealed to the D.C. Circuit, asking the court to overrule the NTSB's decision to overturn the ALJ's order granting attorney's fees and expenses.\textsuperscript{22}

The central issue facing the D.C. Circuit was whether the pilots were prevailing parties.\textsuperscript{23} Relying on authority from the Supreme Court and the D.C. Circuit, the court defined "prevailing parties" as parties that "receive only some form of judicial relief."\textsuperscript{24} Under this definition, the court found that the ALJ's dismissal was without prejudice and that the pilots received no relief. Ultimately, the court held that the pilots were not prevailing parties and upheld the NTSB's decision to deny the award of attorney's fees and expenses.\textsuperscript{25}

To answer the prevailing party question, the court first had to decide the applicable definition of "prevailing party."\textsuperscript{26} In response to this challenge, the court relied on District of Columbia

\textsuperscript{17} Turner, 608 F.3d at 14.
\textsuperscript{18} See id.; Buckhannon, 532 U.S. at 598.
\textsuperscript{19} Turner, 608 F.3d at 14.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 19.
\textsuperscript{23} Id. at 14.
\textsuperscript{24} Id. at 15.
\textsuperscript{25}Id. at 17.
\textsuperscript{26}See id. at 14–15; Contractor's Sand & Gravel, Inc. v. Fed. Mine Safety & Health Review Comm'n, 199 F.3d 1335, 1339 (D.C. Cir. 2000) (supporting the proposition that a federal appellate court need not defer to an agency's interpretation of a generally applicable statute).
v. Straus. The Straus court described a three-part test for "prevailing," distilled from Buckhannon: "(1) there must be a 'court ordered change in the legal relationship' of the parties; (2) the judgment must be in favor of the party seeking the fees; and (3) the judicial pronouncement must be accompanied by judicial relief." The court in Turner further simplified this test to say that "prevailing" means "a party need receive only some form of judicial relief, not necessarily a court-ordered consent decree or a judgment on the merits." With this simplified definition of "prevailing party," the court greatly expanded the definition that the NTSB had provided. The NTSB held that a party can only prevail if he receives "an enforceable judgment on the merits of [his] case" or "a court-ordered consent decree that resulted in a change in the legal relationship between the parties." However, even with the NTSB's much narrower definition, all members of the Board did not agree—in a dissent one board member questioned the applicability of Buckhannon because of factual differences. In Buckhannon, the Supreme Court rejected a claim for attorney's fees under a civil action "catalyst theory," while Turner involved defendants' claims for relief in agency adjudication. The D.C. Circuit did rely on precedent to determine the more inclusive "prevailing party" definition. In Carbonell v. INS, the Ninth Circuit described most circuits as broadly defining "prevailing" when awarding attorney's fees. The court stated that "prevailing" had been broadened to include, in the D.C. Circuit, rulings on judicial grounds

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27 Turner, 608 F.3d at 15.
29 Turner, 608 F.3d at 15.
30 Id. at 14.
31 Id. at 15.
32 Id. at 14 (the NTSB dissent questioned the fact that Buckhannon addressed fee shifting in a plaintiff’s action while the Turner pilots were defendants against the FAA).
33 See Buckhannon, 532 U.S. at 598 (stating that catalyst theory “posits that a plaintiff is a ‘prevailing party’ if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant’s conduct”).
34 See Turner, 608 F.3d at 13–14.
35 See id. at 15.
36 See 429 F.3d 894, 899 (9th Cir. 2005).
and grants of preliminary injunctions, and, in the Ninth Circuit, even court orders with voluntary stipulations.\textsuperscript{37}

The court applied its test of “some form of judicial relief” to the facts surrounding the FAA’s dismissal of its claims against Turner and Coonan and found that “there was nothing in this case analogous to judicial relief.”\textsuperscript{38} The court claimed that, “[o]nce the FAA withdrew its complaints, the pilots were no longer the subject of proceedings to suspend their licenses,” further reasoning that this withdrawal meant “the FAA had unilaterally ended the adversarial relationship between the parties, leaving them where they were before the complaint was filed.”\textsuperscript{39}

Since the ALJ was not needed to dismiss the FAA’s complaint, the dismissal was not a form of relief because the effect of the ALJ dismissing the claim was the same as if the ALJ had taken no action.\textsuperscript{40}

Finally, in addressing the first impression issue of the present case, the Turner court decided the “prevailing party” test and applied that test for the first time to a § 504(a)(1) claim.\textsuperscript{41} Previously, the D.C. Circuit had held Buckhannon generally applicable to EAJA cases, but had only dealt with civil actions, while the case at hand is an “agency adjudication.”\textsuperscript{42} The court admitted, “we have never specifically held Buckhannon defines ‘prevailing party’ as it is used in Section 504(a)(1).”\textsuperscript{43} In failing to layout a much needed definition of “prevailing party” for agency adjudication claims, the court hid behind the fact that the pilots did not raise the issue of the differences between civil action and agency adjudication, and said that the Buckhannon definition that is adopted in the present case does not necessarily apply to future agency adjudication.\textsuperscript{44}

\textsuperscript{37} See District of Columbia v. Jeppsen, 514 F.3d 1287, 1290 (D.C. Cir. 2008) (jurisdictional grounds ruling can create a prevailing party); Carbonell, 429 F.3d at 895-96 (a court order with a voluntary stipulation can create a prevailing party); Select Milk Producers, Inc. v. Johanns, 400 F.3d 939, 945 (D.C. Cir. 2005) (a preliminary injunction can create a prevailing party).

\textsuperscript{38} Turner, 608 F.3d at 15-16.

\textsuperscript{39} Id. at 16.

\textsuperscript{40} Id.; see 49 C.F.R. § 821.12(b) (2010) (stating that a complaint can be withdrawn without the approval of an ALJ).


\textsuperscript{42} Turner, 608 F.3d at 15 n.***; see e.g., Consol. Edison Co. v. Bodman, 445 F.3d 458, 447 (D.C. Cir. 2006).

\textsuperscript{43} Turner, 608 F.3d at 15 n.***.

\textsuperscript{44} Id.
The D.C. Circuit’s analysis in *Turner* begins on the right track by implementing a broad definition of “prevailing party.” Before *Turner* arrived at the D.C. Circuit, the NTSB tried to interpret existing case law to narrowly define “prevailing party,” but rendered a weak opinion, with one of its three members dissenting. By narrowly defining “prevailing party” as receiving an enforceable judgment or a court order that changed the relationship of the parties, the NTSB easily held that Turner and Coonan did not fall within its strict classification; the NTSB’s definition, and not its application, resulted in its ruling in favor of the FAA. When *Turner* reached the D.C. Circuit, the court was able to derive a test from *Buckhannon* and modify that test using federal appellate court precedent to widen the definition of “prevailing party.”

Still, the D.C. Circuit court should have been more precise in its definition. The court claimed the authority to define “prevailing party,” distinguished a Supreme Court holding, and followed federal circuit precedent, but did not truly seize the opportunity to offer a clear definition of “prevailing party” and set a much needed precedent. Instead, the court weakly admitted, “we proceed upon that premise and do not determine whether the understanding of ‘prevailing party’ . . . necessarily or always applies to that phrase in § 504(a)(1).” The *Turner* court was right to broaden the definition of prevailing party so that pilots could receive relief when the FAA unilaterally terminates an action, but it should have carefully established a definition that would apply to future cases regarding defendants in EAJA agency adjudication claims. Despite its feigned attempt to limit its application, the court should have realized that its holding would have far-reaching implications for FAA litigation. Under the broad definition of “prevailing party,” the court’s analysis should differ from the NTSB’s analysis, which uses a narrow definition.

Though the D.C. Circuit correctly broadened the definition of “prevailing,” its analysis under that definition fails to persuade. The court misapplied its definition of “prevailing party”

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45 See *supra* notes 28-30 and accompanying text.
46 *Turner*, 608 F.3d at 14.
47 See *id*.
48 See *supra* notes 35-36 and accompanying text.
49 See *supra* notes 41-42 and accompanying text.
50 *Turner*, 608 F.3d at 15 n.***.
51 *Id.* at 17.
and incorrectly blocked the pilots from collecting their remedy of attorney’s fees. First, the court claimed that the pilots did not prevail since the FAA’s claim against them was dismissed without prejudice.\textsuperscript{52} Under the \textit{Turner} court’s definition of prevailing as “only some form of judicial relief,” the court could have found that the FAA’s dismissal did provide the pilots relief—the relief of a dismissal, which is akin to a ruling on judicial grounds without judgment on the merits or a preliminary injunction.\textsuperscript{53} Under the court’s broad definition of prevailing party, the court should not simply regard a dismissal as a non-remedy when this is the exact relief that the pilots sought.\textsuperscript{54}

A second element of the court’s analysis is flawed. The court mistakenly reasoned that the pilots were left “where they were before the complaint was filed.”\textsuperscript{55} This reasoning is not persuasive; looking at the relevant statute, the EAJA was conceived for the very reason that a party who succeeded in an adversary adjudication could be made whole by an award of incurred fees and expenses, unless the agency was “substantially justified” in its claim.\textsuperscript{56} Here, the ALJ clearly held that “far from being ‘substantially justified,’ the FAA had ‘proceeded on a weak and tenuous basis with a flawed investigation bereft of any meaningful evidence.’”\textsuperscript{57} However, the court ignored the fact that the pilots were necessarily worse off by initially having their pilots’ certificates taken and then having to defend themselves from the FAA’s unwarranted accusations. Rather than simply trying to reason that because the charges were dismissed the pilots were left in the same position, the \textit{Turner} court should apply its broader definition of “prevailing” to the facts at hand to understand that the pilots have prevailed in the FAA’s withdrawal, and that, in line with the purpose of § 504(a)(1), the pilots should be made whole through an award of attorney’s fees.

Moreover, the potential future ramifications of the court’s holding in \textit{Turner} are alarming. The court’s reasoning gives an advantage to the FAA in its dealings with pilots—the FAA can simply withdraw an ALJ appeal in order to avoid EAJA repercussions. Without the check of EAJA fee awards to successful defendants, pilots are left without a defense to FAA actions that

\textsuperscript{52} See \textit{id}. at 16.
\textsuperscript{53} See \textit{supra} note 36 and accompanying text.
\textsuperscript{54} \textit{Turner}, 608 F.3d at 14, 15.
\textsuperscript{55} \textit{Id}. at 16.
\textsuperscript{57} \textit{Turner}, 608 F.3d at 14 (quoting the ALJ’s holding).
may be “weak and tenuous” or “without substantial justification.”

In conclusion, the D.C. Circuit’s definition of “prevailing party” was correct, but it failed to correctly apply its broad definition to its analysis of the facts. Although the court attempted to limit its definition and analysis of “prevailing party,” it is likely that Turner can be relied on by the FAA to defend against awards of fees and other expenses to pilots that prevail in their defense of frivolous FAA actions. The D.C. Circuit should make a clear decision in the future that respects the substance of the EAJA and protects pilots from intrusive FAA action by knowingly defining and carefully analyzing the “prevailing party” so that a larger class of successful pilot defendants can recover fees and expenses when justified.

58 See id.