**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

**CASE NO.: 02-12966J**

**DENISE FARMER**

**Appellant,**

**v.**

**UNITED SPACE ALLIANCE LLC, and LOCKHEED MARTIN SPACE OPERATIONS COMPANY,**

**Appellees.**
**_____/**

**APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF FLORIDA**

# BRIEF OF AMICUS CURIAE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, FLORIDA CHAPTER

**IN SUPPORT OF APPELLANT AND IN SUPPORT OF REVERSAL**

**RESPECTFULLY SUBMITTED BY:**

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Farmer v. United Space Alliance LLP, Case No. 02-12966J

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Counsel for Appellant/Plaintiff, DENISE FARMER, certifies that the following persons and entities have or may have an interest in the outcome of this case:

Wayne L. Allen, Esquire (Counsel for Plaintiff/Appellant)

Wayne L. Allen & Associates, P.A. (Counsel for Plaintiff/Appellant)

John Antoon, II, United States District Judge

Kevin Thomas Duffy, United States District Judge

Denise Farmer (Plaintiff/Appellant)

James G. Glazebrook, U.S. Magistrate Judge

Russell Hamilton, Esquire (Counsel for Defendants/Appellees)

Richard E. Johnson, Amicus Counsel, Florida NELA

Lockheed Martin Space Operations Company (Defendant/Appellee)

National Employment Lawyers Association, Florida Chapter, Amicus

Adrienne E. Trent, Esquire (Counsel for Plaintiff/Appellant)

United Space Alliance, LLC (Defendant/Appellee)

_____
Richard E. Johnson

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## INTEREST OF AMICUS CURIAE AND STATEMENT OF CONSENT

The National Employment Lawyers Association (NELA) is a nationwide nonprofit, nonpartisan organization of approximately 3,000 lawyers who regularly litigate employee claims of employment discrimination under both federal and state Civil Rights Acts, and who regularly seek to expand the interpretation given those acts. Because this case threatens the ability of NELA lawyers to bring claims to remedy employment discrimination, threatens to chill meritorious claims, and departs radically from settled law, its proper resolution is a matter of substantial concern to NELA and its members. NELA has filed numerous amicus briefs in the United States Supreme Court and in the United States Courts of Appeals in all circuits.

The Florida Chapter was founded in 1993 and has approximately 200 participating attorneys around the state. The Florida Chapter's amicus activity has been mostly specialized in the area of the Florida Civil Rights Act -- the statute at issue in the instant case. The Florida Supreme Court has accepted amicus briefs from Florida NELA in five cases. Florida NELA has also filed numerous amicus briefs in the District Courts of Appeal and has appeared previously as an amicus before this Court.

Neither National nor Florida NELA has any financial interest in the outcome of this case. Appellant's counsel Wayne Allen and Adrienne Trent are members of

both National and Florida NELA and therefore pay regular member dues to each organization.

Appellant's counsel have consented to the filing of this amicus brief. Appellee's counsel have refused consent.

## STATEMENT OF THE ISSUES

1. Whether a state offer of judgment statute may be interpreted to amend an act of Congress such as Title VII to impose a conflicting attorney fee scheme on a federal law that already has a comprehensive fee regimen of its own.

2. Whether a state offer of judgment statute contrary to Rule 68 may preempt Rule 68 in federal court.

3. Whether the court below correctly found that the Florida Civil Rights Act permits fee shifting in favor of the defendant pursuant to a separate offer of judgment statute where that act requires fee matters to be resolved in a manner consistent with the treatment of attorney fees under Title VII.

## SUMMARY OF ARGUMENT

Federal judges may not read a state statute as amending an act of Congress. In finding the Appellant's Title VII claim inextricably intertwined with her counterpart state law claims and imposing defense fees under a state offer of judgment statute, the court below interpreted a state law as subjecting Title VII to a state fee shifting

scheme contrary to Title VII's own fee regimen.

The court below did exactly the opposite of what the law requires. Where federal and state claims have a common nucleus of operative fact, federal fee law will apply to both sets of claims. Here the district court instead applied state law to both.

All five of Florida's district courts of appeal have held that state fee and cost law may not apply to federal civil rights claims.

The state offer of judgment statute conflicts with Rule 68 in two important respects. Unlike Rule 68, the state law covers losing plaintiffs as well as those who win and recover less than the offer. The state law shifts fees in favor of a defendant whereas Rule 68, in civil rights case, may reduce the plaintiff's fees but may not shift fees in favor of the defendant.

The Florida Civil Rights Act itself contains language adopting the Title VII fee standard -- a standard that can not be reconciled with the offer of judgment statute. The Florida Supreme Court has held that wherever FCRA may be interpreted reasonably in favor of granting access to the remedy for claimants, that interpretation will prevail over others. The court below applied a contrary principle of construction.

## ARGUMENT

### I. A State Legislature May Not Amend An Act Of Congress.

### A. Background And Framework For Analysis Of This Case.

The court below is the first known to have awarded fees to a defendant in a Title VII case on an offer of judgment in either state or federal court. The case involved unsuccessful claims under both Title VII and its state counterpart, §§ 760.01-760.11, Florida Statutes, The Florida Civil Rights Act of 1992 (FCRA). The claims were identical under federal and state law. The court below acknowledged that the Title VII claims were immune from the state's offer of judgment statute, § 768.79, Florida Statutes, but then proceeded to apply that statute to one Title VII claim anyway. The court accomplished this on the theory that the state and federal claims were inextricably intertwined, indeed virtually co-extensive, therefore an award of fees on the state claims was the same amount as an award of fees on all claims. But the court overlooked the fact that the reverse is also true -- an award on the federal claims would be the same amount as on the state claims. It is inescapable that the court awarded fees against the Title VII claims on the state offer of judgement. The acid test is whether Farmer could have accepted the offer of judgment on the state claims and gone on litigating under Title VII. She could not, so the offer of judgment was applied to Title VII. This is not permitted. Nor does

federal law permit an award of fees on the state claims when they share a common nucleus of operative fact with the federal ones.

### B. Controlling Law Requires Federalization Of State Claims For Fee Purposes When Federal And State Claims Arise From A "Common Nucleus Of Operative Fact."

The court below properly noted that Farmer should be exempted from the offer-of-judgment statute on all of her claims for sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.). However, the court failed to take the next required step in the analysis where federal and state claims are joined by a "common nucleus of operative fact." In such cases, the state claims are likewise immune from the offer of judgment. Indeed, the court got the law exactly backward. Because of the common nucleus of operative fact, the court stripped the Title VII claims of their immunity rather than extending that immunity to the state claims.

The court failed to acknowledge that Moran v. City of Lakeland, 694 So.2d 886 (Fla. 2d DCA 1997), officially established for Florida's offer-of-judgment laws what has been known for many years: that state laws pertaining to attorney fees and costs can not be applied, even in state court, to federal causes of action. The court in Moran noted that federal law preempts state law where the two conflict. That case, like this, was a civil rights action. The appropriate federal fee provisions grant fees

to plaintiffs as a matter of course but to defendants only in extraordinary circumstances where the suit is found to be frivolous. Section 768.79, by contrast, allows fees to defendants and plaintiffs equally, regardless of the merit of the case. The court therefore held the offer of judgment law to be inapplicable because it is trumped by the standard stated in Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978), that while prevailing plaintiff fees are virtually automatic, prevailing defendant fees are available only in frivolous cases.

Under the doctrines established in Maher v. Gagne, 448 U.S. 122 (1980) and Hensley v. Eckerhart, 461 U.S. 424 (1983), federal fee law governs fees for state law causes of action joined with federal causes of action so long as both sets of claims arise from a "common nucleus of operative fact." Florida courts have recognized that this doctrine will operate to award attorney's fees on successful state law claims joined with fee-shifting federal claims even where the state claim provides no fees and the federal claim remains undecided. Steinberg v. City of Sunrise, 545 So. 2d 424, 426 (Fla. 4th DCA 1989) ("it is sufficient if the plaintiff succeeds on a substantial pendent state claim based on the same operative facts") (relying upon Maher and Hensley and collecting later cases).

The essence of the doctrine is that federal law preempts contrary state law treatment of even state causes of action which arise from the same facts of companion

federal claims, so the state offer of judgment statute may not be applied to the case at hand. Farmer's state claims not only arose from a "common nucleus of operative fact" with the federal claims, the facts supporting the state and federal claims were the same, as the court below noted.

The Court was correct in so finding, but erred in overlooking the necessary consequence of such a finding under controlling U.S. Supreme Court precedent which requires a federalization, for fee purposes, of any state claim paired with a federal claim which arises from a "common nucleus of operative fact." Thus the federal fee standard, inescapably, must be applied also to the state claims.

It must be noted that this merging of federal and state claims under a federal umbrella for fee purposes is not unfair to defendants, because it sometimes works in their favor. When federal and state claims arise from a common nucleus of operative fact, and when both are frivolous, the defendant is entitled to fees on the state claims as well as the federal ones even though no statute provides fees for the state claims. Munson v. Milwaukee Board of School Directors, 969 F.2d 266, 271-72 (7th Cir. 1992).

### C. Florida Law And Policy Has Heretofore Respected Federal Preemption in Civil Rights Matters.

Moran v. City of Lakeland, 694 So.2d 886 (Fla. 2d DCA 1997), did nothing

new. It merely applied to the offer of judgment statute legal principles that had been known for many years to apply generally. Garan, Inc. v. M/V Aivik, 907 F. Supp. 397 (S.D. Fla. 1995) (§ 768.79 offer of judgment not applicable in federal admiralty case because it is a substantive rule in direct conflict with federal maritime law expressly requiring each party to pay own fees); Petsche v. Prudential Ins. Co., 607 So.2d 514 (Fla. 2d DCA 1992) (state statute providing for mandatory fees in ERISA cases is preempted by ERISA itself which provides for discretionary fee awards).

In reliance on Moran, the court in Clayton v. Bryan, 753 So. 2d 632 (Fla. 5th DCA 2000), held § 768.79 inapplicable to an action under a federal consumer protection statute with an attorney fee provision tracking that of 42 U.S.C. § 1988 under which a prevailing plaintiff is entitled to fees but a prevailing defendant is eligible for a fee award only on a frivolous suit. One judge dissented, arguing the difference between a statute that penalizes a plaintiff who continues a non-frivolous suit after receiving a settlement offer versus a statute that penalizes a plaintiff who brings the same suit without receiving such an offer. Id. at 634-5 (Harris, J., dissenting). The argument is a mere tautology, asserting a distinction without a difference. It is remarkably similar to the reasoning of the opinion below in missing the point that fees may not be awarded against any plaintiff in any case governed by the Christiansburg standard for any reason other than frivolity.

In an analogous situation, another district court has held that 42 U.S.C. § 1983 preempts the pleading requirements of § 768.72, for all the reasons relied upon in the foregoing authorities. Sanchez v. Degoria, 773 So. 2d 1103 (Fla. 4th DCA 1999).

Oldring v. Duval County School Board, 567 So. 2d 519 (Fla. 1st DCA 1990), stands as an often-neglected precursor of Moran. The Oldring court applied the Christiansburg standard to immunize a § 1983 plaintiff from Fla.R.Civ.P. 1.1420(d), providing that a party who has once dismissed an action and who recommences that action against the same party must pay the costs of the old action before proceeding with the new. The School Board sought both fees and costs as a precondition to the second suit going forward. The First District reached the obvious conclusion that any fees of any sort in a § 1983 action must be awarded according to the Christiansburg standard or not at all.

The Third District recently adopted Moran in reversing an award of fees under § 768.79. Chapman v. Laitner, 809 So. 2d 51 (Fla. 3d DCA 2002). Thus all five of Florida's district courts of appeal agree that state law fee provisions are void against federal claims covered by the Christiansburg standard. Where, as in the FCRA at § 760.11(5), the Florida Legislature has adopted the Christiansburg standard for a state law claim, it too must be immune from any other standard of attorney fees.

## II. The State Offer Of Judgment Statute Conflicts With Fed.R.Civ.P. 68

This Court has recently explained in considerable detail the process of determining whether a state law or rule conflicts with a federal rule of procedure. A conflict still exists where the state law violates no affirmative command or requirement of the federal rule but where the federal rule nonetheless occupies the statute's field of operation. Cohen v. Office Depot, Inc., 184 F.3d 1292, 1298 (11th Cir. 1999), aff'd on rehearing in pertinent part, 204 F.3d 1069, 1072 (11th Cir. 2000). The Florida offer of judgment statute fails both tests. First it plainly conflicts with Rule 68. Second, even if it did not, Rule 68 is carefully crafted to occupy the entire field of operation of offers of judgment in federal courts.

Among the principal conflicts are that Rule 68 applies only to winning plaintiffs who recover less than the offer. It has no application to losing plaintiffs such as the one here. Secondly, for claims governed by the Christiansburg standard, Rule 68 can not shift fees to the defendant. It can only reduce the fees of the plaintiff.

### A. Losing Plaintiffs Are Immune From Fed.R.Civ.P. 68.

One must look at what happened in this case. The plaintiff lost completely. She recovered nothing. In such cases Rule 68 has never applied. In Delta Airlines, Inc. v. August, 450 U.S. 346, 352-3 (1981),the Supreme Court definitively interpreted

Rule 68 as applying only to cases in which the plaintiff won at trial but recovered less than the amount of the defendant's offer of judgment. Under Delta, losing plaintiffs are immune from Rule 68 because it has no possible application to them by its own language.

### B. Rule 68 Reduces Prevailing Plaintiff Fees in Civil Rights Cases But Does Not Shift Fees To Defendants

The Supreme Court's leading Rule 68 case, Marek v. Chesny, 473 U.S. 1 (1985), discussed at length the application of Rule 68 to causes of action governed by the Christiansburg standard. However, the court specifically declined to reach the issue of whether a defendant could ever recover fees from a plaintiff in such cases. Id. at 4 n.1. The court's entire discussion was on the extent to which a winning plaintiff could have prevailing party fees reduced by winning less than the defendant's offer of judgment. The court did not intimate whether Rule 68 would allow any fees to a defendant in such a circumstance. But other federal courts have filled that gap, as noted by the leading treatise on the subject.

> Literally construed, the language of Rule 68 -- that the prevailing plaintiffs covered by the Rule "must pay the costs incurred after the making of the offer" -- not only would deny them recovery of their own post-offer attorney's fees and other costs but also would require them to pay the defendant's post-offer attorney's fees. The Marek decision does not address this question, but the lower courts have uniformly rejected such an interpretation, noting that it would fatally conflict with the rule that narrows a defendant's eligibility for § 1988 fees to instances in

which she defeats a suit that was frivolous or instituted in bad faith.

Schwartz & Kirkland, Section 1983 Litigation, Vol. II § 8.4 (Panel 1997)(footnotes omitted).

Cases under Rule 68 in Christiansburg-type situations which concluded in one fashion or another that prevailing plaintiffs who fall short of a Rule 68 offer of judgment may have their fees reduced but are not liable for the defendant's fees include: In Re Water Valley Finishing, Inc., 139 F.3d 325, 328 (2d Cir. 1998); Gudenkauf v. Stauffer Communications, Inc., 158 F.3d 1074, 1083-4 (10th Cir. 1998); U.S. v. Trident Seafoods Corp., 92 F.3d 855 (9th Cir. 1996); O'Brien v. City of Greers Ferry, 873 F.2d 1115, 1120 (8th Cir. 1989); Crossman v. Maccoccio, 806 F.3d 329, 333-34 (1st Cir. 1986); and Grosvener v. Brienen, 801 F.2d 944,946 n.4 (7th Cir. 1986) (dictum).

## III. The Florida Civil Rights Act Requires The Christiansburg Standard To Be Applied To All Fee Issues To The Exclusion Of All Other Standards

The policy of the Florida Legislature on attorney fees under FCRA explicitly adopts the Christiansburg standard in the following words:

> It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action.

§760.11(5), Florida Statutes.

All matters concerning Title VII fees are governed by the Christiansburg standard. Other standards may not even supplement, let alone alter, that standard. As shown above, even Rule 68, an act of Congress in its own right, has been repeatedly held insufficient to shift fees in favor a defendant on an offer of judgment in a Title VII case. It can, at best, reduce the plaintiff's fees.

If the FCRA is to be "interpreted in a manner consistent with federal case law involving a Title VII action," then it will not be subject to the Florida offer of judgment statute or any other law or rule that awards fees to a defendant on any basis or for any reason other than frivolity. It is just as simple as that.

Both parties in this case as well as the court below have spilled much ink on well-crafted and erudite discussions of whether the offer of judgment statute is substantive or procedural, whether it is more specific than the fee provision of FCRA, which statute is later in time, etc. Such discussions may be edifying as a matter of general education, but they are wholly beside the point here. The Legislature has given us one simple guideline: whatever is the federal case law on fees under Title VII, so too is the law on fees under FCRA.

The Florida offer of judgment statute can not even theoretically shift fees under Title VII; therefore it can not shift fees under FCRA.

The Florida Supreme Court has strengthened this argument with specific reference to the legislative mandate articulated in § 760.01(3), Florida Statutes, that the act as a whole be "liberally construed" to further its general purposes as well as the special purposes of each section. Resolving a procedural ambiguity in favor of a statutory interpretation that chills meritorious efforts to uproot unlawful discrimination is not among the general or special purposes of the Act. Such ambiguities must be resolved in favor of the employee.

> Like Title VII, chapter 760 is remedial and requires a liberal construction to preserve and promote access to the remedy intended by the Legislature.

Joshua v. City of Gainesville, 768 So. 2d 432, 435 (Fla. 2000).

So at a minimum, liberal construction means, in the familiar sports metaphor, that a "tie goes to the runner." It means that, unless the plaintiff's position is completely unreasonable, a court must resolve any doubts about the meaning of the Florida Civil Rights Act in favor of the person seeking access to the remedy, the plaintiff. Courts are therefore required to interpret the fee shifting provisions in a manner that forbids fee shifting against the plaintiff absent a frivolous suit.

## CONCLUSION

The decision of the district court granting fees to Appellees should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the type-volume Fed. R. App. P. 32(a)(7)(B). This brief contains 3332 words from Page 1 through the signature block.

Richard E. Johnson

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two true and correct copies of the foregoing Amicus Brief have been furnished in both paper and electronic formats by U. S. Mail this 15th day of July, 2002, to W. Russell Hamilton, III, Esq., Morgan, Lewis & Bockius LLP, 5300 First Union Financial Ctr., 200 South Biscayne Boulevard, Miami, Florida 33131-2339; and to Wayne L. Allen, Esq., and Adrienne E. Trent, Esq., Wayne L. Allen & Associates, 700 N. Wickham Road, Suite 107, Melbourne, Florida 32935.

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