IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA
SECOND DISTRICT

YODER BROTHERS, INC.,

Defendant/Appellant,

v.

Case No. 2D06-1935
L. T. No.: 04-CA-001461

JAMES WEYGANT

Plaintiff/Appellee.
_____/

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

_____

BRIEF IN SUPPORT OF APPELLEE
ON APPEAL FROM THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR LEE COUNTY, FLORIDA

_____

Richard E. Johnson
Florida Bar No. 858323
314 West Jefferson St.
Tallahassee, Florida 32301
(850) 425-1997

Counsel for Amicus National Employment Lawyers Association, Florida Chapter

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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 seek to protect the integrity of those acts. Because reversal of the court below would threaten the ability of NELA lawyers to bring claims to remedy employment discrimination, would chill meritorious claims, and would depart radically from settled law, affirmation of the decision below is a matter of substantial concern to NELA, its members, and their clients. 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 seven cases. Florida NELA has also filed numerous amicus briefs in the District Courts of Appeal, including several filings as an amicus before this Court.

Both parties have consented to Florida NELA's appearance in this case.

SUMMARY OF ARGUMENT

The trial court correctly held that Florida's proposal for settlement statute does not apply to cases brought under the Florida Civil Rights Act. In stating that fees under that act would follow federal case law governing Title VII, the Legislature adopted the Christiansburg doctrine. Under this doctrine, attorney's fees from the employer are virtually certain for a victorious employee, but available to a winning employer only when the suit is "frivolous, unreasonable, or groundless."

Under the federal counterpart to Florida's offer of judgment statute, fees may not be shifted to the employer in a Title VII case. Nor are fees available to the employer if the employee loses completely rather than obtaining a judgment for less than the offer. Accordingly, federal law governing Title VII would not permit fee shifting in the case at hand. With fees under the Florida Civil Rights Act tied to that standard, fees are likewise prohibited under the state offer of judgment statute.

In civil rights cases, unlike ordinary tort cases, a plaintiff functions as a "private attorney general." Under this concept, legislative bodies, federal and state, empower private individuals to bring suit to enforce public policies of the highest order -- policies such as eradicating discrimination in employment. In these cases, there is a presumption in favor of fees for a winning plaintiff and a presumption against fees for a wining defendant, except in cases where the plaintiff's claims were

frivolous, unreasonable, or groundless. This doctrine was born in an era where civil rights actions were merely equitable but has been strongly reaffirmed after the advent of damages in those cases. The point of the theory of the private attorney general is to provide incentives for plaintiffs to sue and for lawyers to take their cases to get important laws enforced. Otherwise the taxpayers would be burdened with these enforcement duties -- responsibilities that would entail hiring of vastly greater numbers of attorneys in government employment at public expense. The incentives for private enforcement would diminish substantially if even worthy cases could result in the employee having to pay the fees of the employer. Thus employers who seek fees in non-frivolous cases not only seek money for themselves, but seek to externalize vast costs to the public treasury.

Florida's offer of judgment statute applies only to actions for monetary damages. But every discrimination case is a case for equitable relief even if it seeks only damages on its face. The equitable relief is provided in the statute itself. The shape of the equitable relief that may be appropriate can not be known until after trial. That relief could thus never be effectively included in an offer of judgment, especially where the relief calls for monitoring of progress by the court.

ARGUMENT

STANDARD OF REVIEW

All questions presented for review in this brief are issues of statutory interpretation. They are pure-law issues, reviewed in this court under the de novo standard. See, e.g., B.Y. v. Dep't of Children & Families, 887 So. 2d 1253, 1255 (Fla. 2004).

I. The Meaning of "Consistent With Federal Case Law Involving A Title VII Action"

The trial court correctly held that Florida's proposal for settlement (also called offer of judgment) statute, §768.79, Florida Statutes, does not apply to cases brought under the Florida Civil Rights Act.

This case hinges entirely on the interpretation of the statutory language the Florida Legislature used in stating its policy on attorney fees in the Florida Civil Rights Act:

> 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. The leading federal case on attorney's fees under Title VII is Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978). An oft-quoted passage in that opinion states in capsule form what is commonly called "the Christiansburg doctrine."

> To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, **a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless**, or that the plaintiff continued to litigate after it clearly became so.

Id. at 422 (emphasis added).

As shown below, "federal case involving a Title VII action" would not permit application of any offer of judgement statute to the extent of shifting an opponent's attorney's fees to a plaintiff in a discrimination or harassment case.

II. Fee Shifting Not Permitted in Title VII Cases Under Fed.R.Civ.P. 68

The employer in this case has claimed in its brief that there is no federal counterpart to Florida's offer of judgment statute. But Fed.R.Civ.P. 68 is just such a counterpart. The interplay of that rule with §768.79, Florida Statutes, in federal diversity cases is discussed in McMahan v. Toto, 256 F.3d 1120 (11th Cir. 2001).

As shown below, if this were a Title VII case in federal court, no offer of judgment or proposal for settlement could have shifted fees to the employer. Thus the mandate of § 760.11(5), Florida Statutes, will not permit such shifting here.

A. 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).

B. Losing Plaintiffs Are Immune From Fed.R.Civ.P. 68.

One must look at what happened in this case. The plaintiff lost completely. He 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. Thus in a Title VII case in federal court, a prevailing employer could never recover fees.

III. "Private Attorney General" Doctrine Invalidates Analogies To Tort

The employer has relied heavily on an analogy to a recent personal injury protection case, State Farm Mut. Auto. Ins. Co. v. Nichols, __ So. 2d. __, 2006 WL

1491542 (Fla. 2006). In Nichols, the Supreme Court allowed the state offer of judgment statute to operate under a regimen where the substantive statute provides for prevailing plaintiff fees but is silent on defense fees under other statutes or rules. The employee's brief argues at length that this is not comparable to a situation where a statute prescribes the circumstances where each side may collect fees from the other, as is the case in the Florida Civil Rights Act. Amicus does not wish to double-cover those points, but instead wishes to look at the policy basis for the "private attorney general" doctrine that underpins the Christiansburg standard.

The idea behind the "private attorney general" can be stated relatively simply: Legislators can vindicate important public policy goals by empowering private individuals to bring suit. Reliance on "private attorneys general" consists essentially of providing a cause of action for individuals who have been injured by the conduct Legislators wish to proscribe, with the additional incentive of attorney's fees for a prevailing plaintiff.

Virtually all modern civil rights statutes rely heavily on private attorneys general. As the Court explained in Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) (one of the earliest cases construing the Civil Rights Act of 1964, which includes Title VII as well as prohibitions on various kinds of discrimination in public

accommodations and federally funded programs), Congress recognized that it could not achieve compliance solely through lawsuits initiated by the Attorney General:

> A [public accommodations] suit is thus private in form only. When a plaintiff brings an action . . . he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a 'private attorney general,' vindicating a policy that Congress considered of the highest priority.

Id. at 401–02. Thus, Piggie Park recognized the recruitment function of the Act: Congress harnessed private plaintiffs to pursue a broader purpose of obtaining equal treatment for the public at large. These private attorneys could reach into the nooks and crannies of illegal discrimination around the nation that the government could not police.

Later, the Court explained that this public function exists even when a civil rights plaintiff asks for compensatory damages rather than injunctive relief. "Unlike most private tort litigants," the civil rights plaintiff "seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms . . . . Regardless of the form of relief he actually obtains, a successful civil rights plaintiff often secures important social benefits." City of Riverside v. Rivera, 477 U.S. 561, 574 (1986). Thus, when "his day in court is denied him," the congressional policy which a civil rights plaintiff "seeks to assert and vindicate goes unvindicated; and the

entire Nation, not just the individual citizen, suffers." Id. at 575 (internal quotation marks omitted).

Congress considered Title VII enforcement a policy of the "highest priority." Piggie Park, *supra*. Likewise, the Florida Civil Rights Act reflects an "overwhelming public policy" to encourage plaintiffs to bring suits to eradicate discrimination. Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1103 (Fla. 1989). More recently, the Florida Supreme Court returned to that theme with even more 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. Punishing a losing plaintiff who had a reasonable claim is never among the general or special purposes of the Act. That chills enforcement of the discrimination statutes by private plaintiffs and puts the burden of enforcement back on the taxpayers.

> 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). Access to the remedy is impaired rather than promoted where an offer of judgment statute may bankrupt a plaintiff for declining a settlement that does not even make provision for the equitable remedies in the case.

IV. Equitable Relief Needed In Discrimination Cases Can Not Be Fairly Addressed In An Offer of Judgment

In Di Paola v. Beach Terrace Association, Inc., 718 So. 2d 1275 (Fla. 2d DCA 1998), this court voided an offer of judgment that offered only money when the complaint also sought injunctive and other equitable relief. The Di Paola court found that the failure of an offer to agree to the complaint's demands for injunctive relief is fatal to the validity of the offer.

> If the plaintiffs had accepted the offer, they might have been forced to continue litigating their requests for injunctive relief. The purposes of section 768.79 include the early termination of litigation. An offer of judgment that would not allow immediate enforcement on acceptance is invalid.

Id. at 1277.

But in discrimination and harassment law, every case is an equitable case even if the plaintiff also seeks monetary relief. Often, the appropriate equitable relief is not known until after trial, when the court takes up the non-monetary aspects of the case, informed in part by the testimony that won the finding of liability and the verdict, if any.

Most remedy doctrines in discrimination law arose at a time when the principal remedial statute, Title VII, afforded only equitable relief. Congress amended Title VII in 1991 to provide for damages (just as the Florida Legislature amended the Florida Civil Rights Act in 1992 for the same purpose), but as the Supreme Court

made clear in Pollard v. E.I. du Pont de Nemours & Co., 532 U.S. 843, 847-848 (2001), the advent of damages did not in any sense prune back the equitable relief that was previously available. Most of the doctrines guiding such relief developed early on and have been applied consistently over the years, despite the many twists and turns that have accompanied the liability wing of discrimination law.

In discrimination law, make-whole relief must be aimed at placing the Plaintiff in as good a position, in the present and the future, as he would have been in had the discrimination not occurred. The remedy must be complete.

> [T]he court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

Albemarle Paper Co. v. Moody, 442 U.S. 405, 418 (1975).

Thus after the jury verdict or the bench trial in a successful discrimination or harassment case, the court must assess such things as reinstatement, front pay, changes in policies and procedures of the employer, and monitoring and reporting requirements to insure compliance. No offer of judgment can encompass these remedies effectively -- remedies that are essential to this important area of law.

CONCLUSION

The decision of the court below should be affirmed.

Respectfully submitted,

Richard E. Johnson
Florida Bar No. 858323
314 West Jefferson Street
Tallahassee, Florida 32301
(850) 425-1997

Counsel for Amicus Curiae
National Employment Lawyers
Association, Florida Chapter

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amicus Brief has been furnished by U. S. Mail this 3d day of August, 2006, to Edmund J. McKenna, Esq., and Jennifer Monrose Moore, Esq., Ford & Harrison, LLP, 101 E. Kennedy Blvd., Suite 900, Tampa, FL 33602; and to Jason L. Gunter, Esq., Webb, Scarmozzino & Gunter, P.A., 1617 Hendry Street, Third Floor, Ft. Myers, FL 33901.

_____
Richard E. Johnson

CERTIFICATE OF COMPLIANCE

Pursuant to Fla.R.App.P. 9.210(a)(2), I hereby certify that this brief was prepared using proportionately spaced Times New Roman 14 point font.

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Richard E. Johnson