Appeal No. 12-4262

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM HOWE, and others**,**
DENNIS R. THOMPSON; CHRISTY B. BISHOP; THOMPSON & BISHOP LAW OFFICES; BRUCE B. ELFVIN; BARBARA KAYE BESSER; STUART G. TORCH; ELFVIN & BESSER
Appellants,
v.
CITY OF AKRON,
Appellee.

On appeal from the U.S. District Court for the Northern District of Ohio, Case No. 5:06 CV 2779

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION In Support of Appellants

---

Richard R. Renner
Counsel of Record
Tate & Renner
921 Loxford Terrace
Silver Spring, MD 20901
(301) 681-0664
rrenner@igc.org

Rebecca Hamburg Cappy
National Employment Lawyers Association
417 Montgomery Street, Fourth Floor
San Francisco, CA 94104
(415) 296-7629
rcappy@nelahq.org

Bennet D. Zurofsky
Newark, New Jersey 07102
Of counsel for *Amicus*

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, the National Employment Lawyers Association (NELA) makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly-owned corporation? If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly-owned corporation, not a party to the appeal, that has financial interest in the outcome? If the answer is YES, list the identity of such corporation and the nature of the financial interest.

No.

/s/Richard R. Renner
Richard R. Renner

Date: April 23, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rule

Additional Authorities

STATEMENT OF INTEREST

The **National Employment Lawyers Association** (NELA)[1] is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment, and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 circuit, state, and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and other federal appellate courts regarding the proper interpretation of federal civil rights and worker protection laws, in addition to undertaking other advocacy actions on behalf of workers throughout the United States.

As an organization focused on protecting the interests of employees who are treated illegally, NELA has an abiding interest in ensuring that

1 No party's counsel authored any part of this brief. No party and no party's counsel contributed any money intended to fund the preparation or filing of this brief. No person other than NELA members and its counsel contributed money intended to fund the preparation or filing of this brief.

sanctions against such workers and their lawyers are not routinely issued, but rather are reserved only for egregious cases. NELA has an active Ethics & Sanctions Committee that counsels and advises employment lawyers about ethical issues in their practices. The Committee also assists in identifying cases involving sanctions and ethical issues in which NELA's *amicus* participation may help advance the remedial purposes of workplace laws. NELA's interest in this case is to cast light on both the legal issues presented, and assist the Court in determining the broader impact the decision in this case may have on access to the courts for people who have been unlawfully treated as well as their advocates.

STATEMENT OF RELEVANT PROCEDURAL HISTORY

Firefighters of the Akron Fire Department filed this action in November 2006 claiming that the City had denied them promotion on account of their race and age. In December 2008, a jury agreed that their claims had merit and awarded damages. (R-237, Verdicts, Page ID# 7312-7355.)

On October 2, 2009, the trial court entered judgment on the jury's verdict in the amount of $1,891,000, plus interest. (R-278, Judgment, Page ID#7748-7754.) Akron then moved for a new trial. (R-283, 10/19/2009, Akron's Motion for a New Trial, Page ID# 7771-7775.)

On September 30, 2010, the trial court denied the motion for a new trial as to liability, but held that the "jury had lost its way on the issue of damages." (R-307, 09/30/10 Order, Page ID# 7973.) The court therefore ordered a new trial limited to damages. The City retained new counsel. (R-313, Notice of Appearance, Page ID# 8074-8075.)

On April 5, 2011, the court scheduled the retrial on damages for July 18, 2011. (R-326, 04/05/11 Order, Page ID# 8173.) On May 9, 2011, the trial court asked plaintiffs to produce their formula for computing damages and ordered the City to produce payroll records. (R-357, 05/09/11 Conference

Tr., Page ID# 8295-8302.) Plaintiffs' production explained how they intended to use arithmetic to compute damages based upon a backpay period starting May 16, 2005.

The City objected to disclosing its own calculations, claiming they were privileged. *Id*. The trial court nevertheless ordered the City to produce the records promptly. *Id*.

On June 16, 2011, the City delivered its calculations. During a deposition of the City's witness, the City's counsel took those calculations from the hands of plaintiffs' counsel. (R-457-2, Declaration of Bruce Elfvin, ¶ 15, PageID #: 11673.) The City did not thereafter produce its calculations until July 15, 2011, just three days before the trial was originally set to commence. (R-469, Trial Tr., p. 340.)

On June 24, 2011, the City filed a Motion to Compel discovery on liability issues. (R-359, Motion to Compel, Page ID# 8346-8351.) On July 5, 2011, the trial court held that this motion was made in bad faith, and exercised its inherent authority to order that the City should pay plaintiff's counsel fees as a sanction. (R-387, 07/05/11 Order, Page ID #:10865-10866.) The trial court added, "this Order will serve to deter future bad faith conduct by

either party because sanctions will only be increased for future misconduct." *Id*. at p. 5.

On July 7, 2011, the trial court orally ordered the promotion of 18 plaintiffs. (R-404, 07/07/11 Conference Tr., Page ID# 10946-10949, pp. 5-8; R-416, 07/13/11 Order, Page ID# 11104-11106, pp. 1-3.) The court added that, "back pay will terminate, as a matter of law, no later than July 17, 2011." (R-416, 07/13/11 Order, Page ID# 11106.) Also on July 7, 2011, the trial court announced plans to declare a start date for backpay. (R-419-1, 07/07/11 Conference Tr., PageID# 11154-11155, pp. 37-38.)

On July 8, 2011, the trial court issued an order (R-403, 07/08/11 Order, Page ID# 10937-10941) determining that damages would be set by the court sitting without a jury. The court accordingly denied all motions *in limine* as moot.

On July 13, 2011, five days before the scheduled trial, the court held that the commencement date for backpay would be April 5, 2007—two years later than the date (May 16, 2005) plaintiffs had used in their computations. (R-416, 07/13/11 Order, Page ID# 11104-11108.)

On July 14, 2011, the City filed a notice of appeal seeking review of the order for promotions.[2] (R-419, 07/14/2011 Notice of Appeal, Page ID# 11115-11117; Appeal No. 11-3752 (6th Cir.).)

On July 15, 2011, three days before the scheduled trial, and only two days after the court had announced its determination as to the starting date for the calculation of backpay damages, plaintiffs provided the City with supplemental trial exhibits. Exhibit 208 was a new document prepared by Capt. Bradley Carr to reflect the backpay losses computed from April 5, 2007. (R-429, Plaintiffs' Amended Exhibit List, Page ID# 11282-11285; R-493-1 & 498-1, Plaintiffs' Exhibit 208, Page ID# 13997-14177; 14445-14625.). Also on July 15, 2011, the City finally provided its computations of damages—four weeks after the close of discovery. (R-457-2, Declaration of Bruce Elfvin, Page ID# 11671-11673.)

On July 15, 2011, the City also filed with this Court, in Appeal No. 11-3752, a motion for a stay of the order for promotions. The City's motion, with attachments, consisted of 191 pages. Plaintiffs' counsel filed a 27-page opposition to the stay that same day.

2 This Court conducted oral argument for this appeal on January 17, 2013. No decision has yet been rendered. Appeal No. 11-3752.

This Court granted a temporary stay of the reinstatement, and allowed plaintiffs until July 19, 2011, to file further opposition to the stay.

On July 18, 2011, the originally scheduled date for the new trial on damages, the trial court postponed the retrial to July 25, 2011.

On July 19, 2011, plaintiffs' counsel filed their 101-page supplemental opposition to the motion for a stay with this Court. The next day, this Court dissolved the temporary stay and denied the City's motion for a stay of the reinstatement order.

On July 21, 2011, plaintiffs asked the trial court to reconsider its order setting the start date of the backpay period.[3] (R-441, Plaintiffs' Motion for Reconsideration regarding dates for backpay, Page ID# 11399-11405.)

On July 25, 2011, the bench trial on damages commenced. Without hearing any evidence, the court adjourned the trial to the next day to allow the City to depose Capt. Carr in the courtroom about his new calculations. (R-448, 07/25/11 Order, Page ID# 11485.) The trial court later terminated the deposition due to the City's failure to stay within the allowed scope. (R-

3 The trial court overruled this motion on July 25, 2011, by marginal entry. (R-449, Page ID# 11486.)

455-1, 07/25/11 Carr depo., Page ID# 11608-11609, 11653-11655; R-468, 07/26/11 Trial Tr., Page ID# 12543-12544; R-530, 09/24/12 Order, Page ID# 15367.)

On July 26, 27 and 28, 2011, the trial court heard the plaintiffs' evidence on damages. Plaintiffs rested on July 28. The City made an oral motion for judgment on partial findings under Rule 52(c), and later supported that motion with a memorandum. (R-499, 08/26/2011 City Memorandum, Page ID# 14626– 14658.) Sixteen months later, the City announced that it would present no case of its own. (R-565, 11/28/12 Trial Tr., Page ID# 15881-15883.) On December 14, 2012, the parties filed proposed findings of fact. As of this filing, the parties are still waiting for the trial court's final determination of damages.

On July 28, 2011, the trial court excluded the plaintiffs' Exhibit 208 on grounds that it was a "bait and switch." (R-484, 08/12/11 Order, Page ID# 13407-13418.) It also, *sua sponte*, asked the City to submit its attorneys' fees for the purpose of sanctioning plaintiffs' counsel. (R-470, 07/28/11 Trial Tr., Page ID# 13136-13156.)

On August 2, 2011, the trial court ordered the City to provide unredacted invoices "*ex parte* and under seal" for *in camera* review. (R-472, 08/02/11 Order, Page ID# 13192.)

On August 9, 2011, the trial court ordered plaintiffs' counsel to deposit $200,000 with the clerk of the court to be used for sanctions to be determined. (R-476, 08/09/11 Order, Page ID# 13213-13214.)

On August 10, 2011, the City filed, under seal, its invoices. R-481. This item remains sealed to this day, despite plaintiffs' request for a copy. (R-496, 08/22/11, Plaintiffs' Notice of Request for Unredacted Attorney Fee Bills, Page ID# 14304-14307.)

On August 12, 2011, plaintiffs moved for reconsideration of the order requiring them to deposit $200,000. (R-483, Plaintiffs' Motion for Reconsideration, Page ID# 13362-13377; R-484, 08/12/11 Order, Page ID# 13418.) Later that day, the trial court stayed the order to deposit $200,000, announced that it would consider imposition of sanctions on plaintiffs' counsel pursuant to 28 U.S.C. 1927, and allowed briefs to be filed by August 26, 2011. (R-484, 08/12/11 Order, Page ID# 13418.)

On August 26, 2011, both sides filed briefs, and plaintiffs requested an evidentiary hearing. (R-500, Defendant's Brief; R-501, Plaintiffs' Brief and Request for Evidentiary Hearing, Page ID# 14704-14719; R-502, Plaintiffs' Opposition to City's Computation of Fees and Costs and Request for Evidentiary Hearing, Page ID# 14720-14731.) Plaintiffs' brief pointed to the lack of any evidence that they intentionally pursued a meritless claim or multiplied the litigation. The brief noted that the calculations correctly followed the court's own order about the backpay period—a point the City has not contested. R-501, Plaintiffs' Brief, pp. 13-14, Page ID# 14716-17.

On September 24, 2012, the trial court imposed sanctions against plaintiffs' counsel in the amount of $97,056.18. (R-530, 09/24/12 Order, Page ID# 15368-15369.) The trial court's denial of plaintiff's request for an evidentiary hearing can only be inferred from the result since no direct ruling or mention of it was made by the trial court. This appeal followed.[4]

4 The City of Akron has made a motion to dismiss this appeal, claiming that this Court cannot review the sanction until after the trial court enters a final order. NELA takes no position on that motion.

SUMMARY OF THE ARGUMENT

In the plaintiffs' original case, the firefighters asserted claims of race and age discrimination. The jury found these claims to be meritorious and awarded damages. The trial court disagreed with the jury's determination of damages, and ordered a new trial on damages only.

The trial court and defense counsel placed plaintiffs' counsel under extraordinary pressure in the weeks preceding the scheduled retrial on damages. Despite earlier court orders to make a prompt disclosure, the City's counsel had withheld its own computations of the damages until the eve of the new trial. The City also abused discovery opportunities to engage in a prohibited attempt to relitigate liability.

The trial court, meanwhile, changed both the start and (by entering injunctive relief requiring promotions) end dates of the backpay period within the two weeks preceding the scheduled trial. With each of these orders, plaintiffs' counsel had to adjust their own damages computations. In the end, they produced their last computations on July 15, 2011 – just two days after the trial court's order setting the new start date. July 15, 2011, is also the date the City *first* provided its computations of the damages. Yet, the tri-

al court singled out plaintiffs' counsel, not defense counsel, for the imposition of *sua sponte* sanctions without providing plaintiff's counsel with the opportunity for an evidentiary hearing. As noted above, the court awarded the defendants $97,056.18 following an *in camera* review of defense counsel's billing records.

Amicus believes that the imposition of the sanctions here fails to comport with the requirements of 28 U.S.C. §1927 and contravenes the remedial purposes of our civil rights laws. In the context of contentious litigation, the trial court's selective use of sanctions is particularly disturbing.

A trial court's authority to impose sanctions under 28 U.S.C. §1927 depends on a finding that sanctioned counsel acted with a sufficiently culpable state of mind. Here, although no evidentiary hearing was held, the trial court implicitly made a credibility finding that rejected counsel's representations that they had acted in a good faith effort to comply with the court's orders and prosecute their clients' case. The trial court concluded instead that plaintiffs' counsel had engaged in a "bait and switch." No fact finder should make a determination completely rejecting the veracity of a person's statement as to their motive without hearing direct testimony from that person

and testing their credibility through examination. Without holding such a hearing there is simply no factual basis upon which to make the necessary credibility determination. Accordingly, the imposition of sanctions without hearing live testimony from plaintiffs' counsel in the evidentiary hearing that they had requested was a denial of due process.

In addition, *Amicus* asserts that the sanctionsimposed here simply cannot be supported by the record below. Plaintiffs' counsel did not engage in any improper conduct. To the contrary, it appears to *Amicus* that plaintiffs' counsel worked diligently to vigorously represent their clients by recalculating their proofs to conform to the trial courts' rulings and to address the defendants' tardily delivered calculations, while simultaneously engaging in substantial motion practice in both the trial and appellate courts. Punishing civil rights counsel in such circumstances can only serve to discourage hearty advocacy and must therefore be reversed by this Court.

ARGUMENT

I. PLAINTIFFS' COUNSEL COMMITTED NO VIOLATIONS OF THE RULES, AND SANCTIONS ARE IMPROPER WHEN THEY ARE BASED ON CONDUCT THAT IS APPROPRIATE.

A. Imposition of sanctions under 28 U.S.C. §1927 requires evidence of a sufficiently culpable state of mind.

While panels of this Court have disagreed about the appropriate standard to be used for imposing court-initiated sanctions under 28 U.S.C. § 1927, the Court has held that imposing sanctions requires the trial court to find that something more than negligence or incompetence_is necessary to any sanction under section 1927. *Rentz v. Dynasty Apparel Industries, Inc.*, 556 F.3d 389, 396 (6th Cir. 2009). The purpose of 28 U.S.C. §1927 is to "deter dilatory litigation practices and to punish aggressive tactics that far exceed zealous advocacy." *Red Carpet Studios Div. of Source Advantage, Ltd. v. Sater*, 465 F.3d 642, 646 (6th Cir. 2006) (citing *Jones v. Continental Corp.*, 789 F.2d 1225, 1230-31 (6th Cir. 1986)). Section 1927 is "concerned only with limiting the abuse of court processes." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 762 (1980). As a fee shifting statute, Section 1927 is to be construed strictly. *In re Crescent City Estates, LLC*, 588 F.3d 822, 826 (4th Cir. 2009) *cert. denied*, 130 S. Ct. 3278 (2010).

Amici join plaintiffs in urging that this Court take this case *en banc* to resolve the intracircuit debate on the proper standard.[5] Appellants' Br. at 47. We urge the court to requirea finding of "bad faith or intentional or grossly reckless misconduct amounting to conscious impropriety" before sanctions are imposed under Section 1927. *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003). Doing so would bring this Court into alignment with other circuits and better protect civil rights advocates from the chilling effect of sanctions. *See id.*; *Shafii v. British Airways, PLC*, 83 F.3d 566, 571 (2d Cir. 1996); *LaSalle Natl Bank v. First Connecticut Holding Group*, 287 F.3d 279, 288 (3d Cir. 2002); *EEOC v. Great Steaks, Inc.*, 667 F.3d 510, 522 (4th Cir. 2012); *Shales v. General Chauffeurs, Sales Drivers and Helpers Local Union No. 330*, 557 F.3d 746, 749 (7th Cir. 2009); *Barber v. Miller*,

5 Before *Red Carpet Studios,* another panel of this Court held that no bad faith need be found before imposing sanctions under §1927. *Wilson-Simmons v. Lake County Sheriff's Department*, 207 F.3d 818, 824 (6th Cir. 2000). Yet another panel of this Court recognized the intracircuit conflict in *Garner v. Cuyahoga Cnty. Juvenile Ct.*, 554 F.3d 624, 645 (6th Cir. 2009), concluding that resolving the standard was unnecessary for that appeal. *See also*, *Rentz v. Dynasty Apparel Industries, Inc.*, 556 F.3d 389, 396 (6th Cir. 2009)(a sanction under 28 U.S.C. § 1927 requires a finding that counsel acted with "something more than negligence or incompetence[.]").

146 F.3d 707, 711 (9th Cir.1998); *Amlong & Amlong, P.A. v. Dennys, Inc.*, 500 F.3d 1230, 1239 (11th Cir. 2007).

In the 1993 amendments to Rule 11 of the Federal Rules of Civil Procedure, the Advisory Committee note explains that sanctions initiated by the court, "will ordinarily be issued only in situations that are akin to a contempt of court . . ." because there is no safe harbor provision allowing the parties to voluntarily correct their conduct before sanctions are issued.The same judicial restraint is appropriate for *sua sponte* sanctions under 28 U.S.C. §1927.

What all of these standards have in common is an element of *mens rea* derived from the language of 28 U.S.C. §1927. Only an attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be [sanctioned]." *Id.* Whether the attorney's conduct was unreasonable and vexatious can only be determined by testing the attorney's actions through the crucible of live testimony, under questioning from the court and adverse counsel to determine the attorney's thought processes and state of mind. Thus, however the operable legal standard for culpability under Section 1927 may be phrased, due process requires an evidentiary hearing.

As no hearing was held below to determine whether plaintiffs' counsel had a sufficiently culpable state of mind, despite their request therefore, the imposition of sanctions must be vacated.

B. Plaintiffs' counsel committed no misconduct.

Here the lack of an evidentiary hearing to support the trial court's conclusions is especially striking since the procedural history strongly suggests that plaintiffs' counsel were engaged in nothing other than a good faith attempt to comply with the trial court's rulings on the eve of trial. Certainly, such good faith conduct does not meet any standard for sanctions under 28 U.S.C. §1927.

On July 15, 2011, appellants had a reasonable basis to believe that preparing and filing Exhibit 208, Captain Carr's calculations, was consistent with the trial court's previous orders. The trial court had just issued a new order that changed the commencement date for the backpay period. (R-416, 07/13/11 Order, Page ID# 11104-11108.) In the press before trial, counsel

struggled mightily to conform to the court's new directions.[6] This was not vexatiousness, but rather appropriate under the circumstances of this case.

It was five days before the scheduled retrial and the court's ruling had changed one of the most important numbers in their calculations, the starting date for backpay. The week before, the trial court had also set an end date for the backpay award, by ordering the plaintiffs' promotions to occur no later than July 17, 2011. Recalculation of the plaintiffs' damages became necessary in light of these new orders.

Plaintiffs could not possibly proceed to trial based upon calculations that the trial court had held to be erroneous. Counsel has a plain plain duty to conform the proof it offers to the rulings of the court. The trial court's sanction ruling implies that plaintiffs' counsel should not have met that duty but should have instead presented Firefighter Snyder'stheir original calcula-

6 The weeks preceding the retrial of damages were exceptionally busy ones for all counsel and the trial court, involving not only trial preparation in the face of new rulings, but also proceedings relating to the newly issued injunctive relief, the implementation thereof and a stay application filed in this Court. *See* Statement of Relevant Facts and Procedural History, *supra,* pp. 6-8.

tions at trial, even after the court had directed that a different backpay period be used. (R-530, 09/24/2012, p. 2, Page ID#15358)

The trial court criticized plaintiffs' counsel for changing the method of calculation from the one they were relying upon at the time that plaintiffs were deposed. But here too the changes only served to narrow the disagreements between the parties as to the proper method of calculation, something that is ultimately a question of law rather than fact. Importantly, Exhibit 208 adds no new facts to the record. It merely summarizes facts drawn from payroll and contract records that had been produced in discovery and then performs mathematical calculations based upon them.

At the time of the depositions, plaintiffs were relying upon a method that depended upon average salaries earned by those in the higher titles that the jury had earlier concluded plaintiffs had been discriminatorily deprived of. In those depositions, and in the defendants' belated discovery production, defense counsel made clear their disagreements with the method employed by plaintiffs in calculating their damages claim. Exhibit 208 actually hews more closely to the defense contentions in this regard than had the plaintiffs' original method of calculation.

Thus, by offering Exhibit 208, plaintiffs' counsel actually narrowed the issues before the trial court for decision. The fact that the defense rested without even offering any contrary proofs as to how damages were to be calculated strongly confirms that Exhibit 208 narrowed the disagreement between the parties. Such narrowing of the issues is the opposite of conduct that "multiplies the proceedings . . . unreasonably and vexatiously" and therefore further demonstrates why Section 1927 sanctions were improper here. Acting with competent attention to a trial court's changing directions about the backpay period and narrowing the issues in dispute between the parties is not "negligence or incompetence." It is competence. When attorneys are sanctioned for properly performing their duties of listening to the trial court and following its directions, that is error.

Indeed, the trial court's ire over Exhibit 208 is very difficult to understand. All that the Exhibit does is apply an algorithm to the determination of damages that is different from the algorithm that plaintiffs had previously argued for. The underlying facts as to which the algorithm was being applied were completely unchanged. Ultimately, the choice of the proper algorithm used in calculating damages is a question for the court. It is how the

plaintiffs' backpay damages are to be calculated. Applying whatever algorithm the court ultimately chooses to the facts of the case is simply mathematics.

By offering Exhibit 208 into evidence, plaintiffs' counsel gave the City advance notice of how the math applied to the evidence in the record. Counsel had a reasonable basis to believe that their course of conduct was consistent with the directions of the court and did not violate any rule, law or court order. All that Exhibit 208 did was conform to the rulings of the court and narrow the differences between the plaintiffs and the defendant as to the method by which backpay damages were to be calculated. Accordingly it was improper to impose sanctions for the introduction of Exhibit 208. *Pacific Dunlop Holdings, Inc. v. Barosh*, 22 F.3d 113, 119 (7th Cir. 1994).

Counsel here did not multiply the litigation by attempting to further contest the trial court's questionable and changing limitations on the backpay period. Realizing that those issues were properly preserved for appellate review, they recalibrated their proofs to conform to the rulings and to narrow the issues. At its core, counsel's conduct was a natural consequence of the trial court's changing directions about computing backpay and the late pro-

duction of the defendants calculations. As such, it could not support the imposition of Section 1927 sanctions upon plaintiffs' counsel no matter which formulation of the legal standard this court might employ.

II. SANCTIONS MUST BE USED SPARINGLY IN CIVIL RIGHTS CASES TO AVOID ANY CHILLING EFFECT ON LEGITIMATE CLAIMS.

The award of attorneys' fees against a plaintiff in a civil rights action is "an extreme sanction, and must be limited to truly egregious cases of misconduct." *Jones v. Continental Corp.*, 789 F.2d 1225, 1232 (6th Cir. 1986); *accord*, *Riddle v. Egensperger*, 266 F.3d 542, 547, 552-53 (6th Cir. 2001); *Ridder v. City of Springfield*, 109 F.3d 288, 299 (6th Cir. 1997), *cert. denied*, 522 U.S. 1046 (1998); *Patterson v. United Steelworkers of America*, 381 F. Supp. 2d 718, 721 (N.D. Ohio 2005). This Court, therefore, "has been extremely reluctant to uphold an award [of] attorneys' fees for defendants except where the claims in the original lawsuit were so frivolous as to be laughable." *Roberts v. Ward*, 2005 U.S. Dist. LEXIS 23069, at *4 (E.D. Ky. Oct. 6, 2005), affirmed on other grounds, 468 F.3d 963 (6th Cir. 2006). "In short, litigation is messy, and courts must deal with this untidiness in award-

ing fees." *Fox v. Vice*, 131 S.Ct. 2205, 2214, 180 L.Ed.2d 45 (2011); accord *Jordan v. City of Cleveland*, 464 F.3d 584, 604 (6th Cir. 2006).

Plaintiffs brought their claim under Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act (ADEA). These laws reflect the strong public policy of assuring a diverse workforce in which the best candidates can fill every job regardless of stereotypes.

This public purpose is so strong that Congress has authorized the award of attorneys' fees for prevailing civil rights claimants in 42 U.S.C. § 1988 in order to ensure effective access to the judicial process for civil rights grievants. *Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978); *Riddle*, 266 F.3d at 556-57 (Clay, J., concurring). For that reason, a prevailing civil rights plaintiff is presumptively entitled to reasonable attorneys' fees, but *"[b]ecause policy considerations such as these are absent in the case of the prevailing civil rights defendant, attorney's fees are presumptively unavailable*," and are appropriate only upon a finding that the plaintiffs' claims were frivolous, unreasonable, or without foundation. *Id*. at 557 (emphasis added); *accord*,

Wilson-Simmons v. Lake County Sheriff's Dept., 207 F.3d 818, 823 (6th Cir. 2000).

A contrary approach would have a chilling effect on plaintiffs seeking to vindicate their civil rights. *Riddle*, 266 F.3d at 551. The Supreme Court made this clear in *Christiansburg,* noting that assessing attorneys' fees against non-prevailing civil rights 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 Title VII; therefore, such awards should be permitted "not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious." *Id*. at 421, 422. See also *Garner v. Cuyahoga Cnty. Juvenile Ct.*, 554 F.3d 624, 635 (6th Cir. 2009).

The proper inquiry in awarding attorneys' fees against civil rights plaintiffs is whether the record was "devoid of any evidence" to support the plaintiffs' claims. *Smith v. Smythe-Cramer Co.*, 754 F.2d 180, 184 (6th Cir. 1985). Even weak cases do not merit sanction where plaintiffs have any arguable basis for pursuing their claim. *Id*. "There is a significant difference

between making a weak argument with little chance of success . . . and making a frivolous argument with no chance of success. . . . [I]t is only the latter that permits defendants to recover attorney's fees" under § 1988. *Khan v. Gallitano*, 180 F.3d 829, 837 (7th Cir. 1999).

There is nothing in the record here that could support a finding that plaintiff counsel's conduct was "unreasonable, frivolous, meritless or vexatious," Nothing in the record even remotely suggests that plaintiffs' counsel were trying do anything other than adjust to the trial court's rulings and the defendant's arguments in order to most effectively present their evidence and arguments as to the amount of damages. They were not trying to be "vexatious," they were trying to comply with the trial court's orders and conform their evidence accordingly.

Neither is there any evidence of anything resembling a "bait and switch," which is defined as "[a] deceptive commercial practice in which customers are induced to visit a store by an advertised sale item and then are told that it is out of stock or that it is far inferior to some more expensive item." *The American Heritage Dictionary of Idioms* ("bait and switch") by Christine Ammer. Houghton Mifflin Company.[7] Exhibit 208 presented an al-

7 http://dictionary.reference.com/browse/bait and switch, accessed

gorithm for the calculation of damages that was less favorable to the plaintiffs than the one they had previously relied upon. It was the antithesis of a bait and switch, it tried to make the sale at a lower price than what had previously been advertised.

In such a circumstance, the imposition of sanctions pursuant to 28 U.S.C. § 1927 is plainly inappropriate. The fact that the sanctioned attorneys here were representing successful civil rights plaintiffs makes the chilling effect too cold.

The chilling inappropriateness of the sanctions against plaintiffs' counsel is especially striking when it is contrasted with the trial court's much more lenient treatment of defense counsel's conduct below in connection with discovery on the issue of damages. Defense counsel delayed production of the essential payroll records until May 17, 2011—eight weeks before the scheduled second jury trial. The City resisted production of its own computations, claiming privilege for information about what claims it planned to make to the jury. When its privilege argument was rejected by the trial court, the City continued to withhold production of its own calculations, resorting to physically grabbing them away from plaintiffs' counsel on June

16, 2011, after it had initially delivered them to him. (R-457-2, Declaration of Bruce Elfvin, ¶ 15),

Defense counsel also disobeyed a trial court order limiting the scope of its second deposition of plaintiff Carr, but all the trial court did was end that second deposition. (R-455-1, 07/25/11 Carr depo., Page ID# 11608-11609, 11653-11655; R-468, 07/26/11 Trial Tr., Page ID# 12543-12544; R-530, 09/24/12 Order, Page ID# 15367.)

On June 15, 2011, the trial court ordered the City to disclose their calculations and defenses (R-503-3, p. 8, Page ID# 14833), and defense counsel still waited until July 15, 2011, to make that presentation. The trial court, however, selected for *sua sponte* sanctions only plaintiff's counsel's computations, which plaintiff's counsel had diligently updated to reflect the trial court's most recent orders about the backpay period and to narrow the issues in dispute.

Indeed, the disparity between the severity of the trial court's treatment of what it perceived to be plaintiff counsel's improper conduct with its treatment of what it perceived to be defense counsel's improper conduct raises concerns as to whether the trial court's rulings might be reasonably per-

ceived by the public as demonstrating a hostility towards the civil rights claims brought by these plaintiffs.[8] Because Federal Courts should be perceived as an impartial forum for civil rights cases, they should be exceptionally slow to impose sanctions upon counsel who are, at most, guilty of noth-

---

8 *Amicus* is aware of three other appeals brought from sanctions imposed by the same trial judge against civil rights plaintiffs and public defenders that are presently pending before this court:

U.S. v. Llanez-Garcia, 6th Circuit No. 12-3585, District Court No. 1:11-CR-00177, 2012 U.S. Dist. LEXIS 61895, *10. The trial court imposed sanctions on public defender Debra Kanevsky Migdal for an "attempt to obtain discovery information via a subpoena without first requesting the information from the Government in accordance with Rule 16 . . .." The trial court concluded that this attempt was "a usurpation of the Court's subpoena power" and "far exceeded" the bounds of the law. The trial court concluded that it "cannot turn a blind eye" and "must issue a sanction to discourage any future conduct that one Attorney Migdal may seek to justify under the guise zealous representation." *Id*. at 11, 15 and 16. In the appeal, the briefs of all parties urge this Court to find that the sanction under 28 U.S.C. § 1927 is erroneous.

Trans Rail America, Inc. v. Hubbard Township, 6th Circuit No. 12-4297, District Court No. 4:08-cv-02790, 2012 U.S. Dist. LEXIS 13911. The trial court entered sanctions against attorney Michael A. Partlow in the amount of $20,735.10 for filing a frivolous civil rights complaint under 42 U.S.C. § 1983. The trial court found that "counsel acted unreasonably when it refused to dismiss the complaint or fix the deficiencies." *Id*. at *13.

Kendel v. Local 17-A UFCW, 6th Circuit No. 13-3226, District Court No. 5:09cv1999. The trial court determined that attorney Ed Gilbert was subject to sanctions for trial conduct involving questions to opposing wit-

ing more than zealous advocacy for their clients. Indeed, that is the underlying core of the *Christiansburg* line of cases.

Attorneys' fees should only be awarded against civil rights plaintiffs or their counsel when the positions that they have taken are "found to be unreasonable, frivolous, meritless or vexatious." *Id*. at 421, 422. No such conduct was present here. The sanctions, therefore, must be reversed.

III. THE TRIAL COURT VIOLATED DUE PROCESS BY IMPOSING SANCTIONS WITHOUT A HEARING WHEN COUNSELS' STATE OF MIND WAS AT ISSUE, AND WHEN SANCTIONED COUNSEL COULD NOT SEE OR CONTEST THE EVIDENCE FROM WHICH THE SANCTION WAS COMPUTED.

A. Due process requires a hearing when state of mind is at issue.

The trial court imposed its sanctions order based upon its conclusion that plaintiffs' counsel had contrived and executed a "bait and switch" tactic on their claim for damages. The trial court thereby rejected plaintiffs' con-

---

nesses that elicited answers the judge wanted to exclude from evidence.

While acknowledging that the merits of the imposition of sanctions in these other cases are not before this court in the present matter, *Amicus* is struck by what appears to be an unusually high instance of controversial impositions of sanctions in civil rights and public defender cases by this particular trial court.

tentions that their damages computations were good faith adjustments based on the trial court's own changes in its orders about the backpay period. Thus, the trial court's decision turned on an issue of fact about the attorneys' states of mind.

Under either this Circuit's standard for the imposition of Section 1927 sanctions or the standard prevailing in other Circuits, determining counsel's state of mind is at the core of the inquiry when the allegedly sanctionable conduct consists of offering a newly-created Exhibit into evidence. *See* Section I.A., *supra*, at 14-16. How can one determine whether there was "something more than negligence or incompetence" without asking counsel what his or her reasoning was in making the offer? *Rentz v. Dynasty Apparel Industries, Inc.*, 556 F.3d 389, 396 (6th Cir. 2009). Without an evidentiary hearing, how can a court determine whether counsel acted with "bad faith or intentional or grossly reckless misconduct amounting to conscious impropriety?" *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 (11th Cir. 2003).

Here, the trial court implicitly denied the plaintiffs' request for such a hearing, without even explaining why. In doing so, the trial court disreg-

arded the well-established principal that a court must give the offending party notice and an opportunity to be heard before it imposes §1927 sanctions. *Johnson v. Cherry*, 422 F.3d 540 (7th Cir. 2005); *see also*, *Chambers v. NASCO*, 501 U.S. 32, 40, 50 (1991) (approving sanction of attorneys' fees on trial court's inherent power, but only "after full briefing and a hearing," and holding that, "as long as Chambers received an appropriate hearing, he may be sanctioned for abuses of process beyond the courtroom."); *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767, fn. 13 (1980) (holding that "[l]ike other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record."); *Ted Lapidus, S.A. v. Vann*, 112 F.3d 91, 96-97 (2d Cir. 1997) ("a sanctioned attorney must receive specific notice of the conduct alleged to be sanctionable and the standard by which that conduct will be assessed, and an opportunity to be heard on that matter").

"The absence of limitations and procedures [when sanctions are imposed] can lead to unfairness or abuse." *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126, 128, (2d Cir. 1998). The Second Circuit explained that, "sanctions and contempts raise certain similar concerns." *Id*. at 129. "[U]nfairness and

abuse are possible, especially if courts were to operate without any framework of rules or cap on their power to punish." *Id*. The *Mackler Products* Court vacated a sanction for presenting perjured testimony holding, "that the imposition of a sufficiently substantial punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case." *Id.; accord*, Fed. R. Civ. P. 11 1993 Am. Adv. Comm. note. Certainly, the appellants here did not receive anything remotely resembling those protections.

This Court's holding in *Cook v. Am. S.S. Co*., 134 F.3d 771 (6th Cir. 1998), that a hearing was not necessary before imposition of § 1927 sanctions is not contrary because of the special factual circumstances of that case. There, the sanctioned attorney had physically attacked opposing counsel in the hallway outside of the Courtroom. The Federal Protective Service provided an official report and the sanctioned attorney did not deny that the attack had occurred. The attorney's reasons for the attack were held to be irrelevant as this court concluded that he "could not have honestly believed that force was necessary." *Id.* at 777.

Here, however, the case turns entirely on disputed facts, namely were plaintiffs' attorneys engaged in a bad faith game of "bait and switch" or were they merely trying to conform their proofs to the court's rulings and narrow the issues in the days immediately preceding the trial. Certainly, due process required that the sanctioned attorneys be given an opportunity to testify as to what they thought they were doing and why they thought it was appropriate to have Captain Carr prepare the recalculated exhibit of plaintiffs' damages.

Here the lack of an evidentiary hearing to support the trial court's conclusions is especially striking since the trial court essentially held that plaintiffs' counsel's claims of good faith and proper motive were not worthy of belief despite the fact that the procedural history of this case strongly suggests that they were engaged in nothing other than a good faith attempt to comply with the trial court's rulings and narrow the issues on the eve of trial. *See* Section I.B., *supra.*tiary hearing to support tth conduct does not meet any standard for sanctions under 28 U.S.C. §1927.

As the Supreme Court has stated in another context, "[b]ecause of the many facets of human motivation, it would be unwise to presume[.]" *Oncale*

v. Sundowner Offshore Services, Inc., et al., 523 U.S. 75, 78 (1998). On the present record, with no evidentiary hearing, it is hard to escape the conclusion that the trial court below acted on presumption, and not evidence. In any event, it is error that the court below made findings about counsel's state of mind, and imposed sanctions based on those findings, without affording counsel the evidentiary hearing they requested.

B. Due process for sanctions under 28 U.S.C. §1927 requires an opportunity to review the evidence upon which the amount of a sanction is computed.

It is disturbing that the court computed the amount of the sanction based on an *in camera* review of the billing records of defendant's counsel, despite plaintiffs' objections. A trial court must apply the correct standard, and the appeals court must make sure that such application has occurred. *Fox v. Vice*, 131 S.Ct. 2205, 180 L.Ed.2d 45, 56 (2011), *quoting Perdue v. Kenny A*., 559 U.S. ___, 130 S.Ct. 1662, 176 L.Ed.2d 494, 509 (2010) ("Determining a 'reasonable attorney's fee' is a matter that is committed to the sound discretion of a trial judge, . . . but the judge's discretion is not unlimited") "The district court's calculation of the lodestar value, as well as any justifiable upward or downward departures, deserves substantial deference,

but only when the court provides a clear and concise explanation of its reasons for the fee award." *Gonter v. Hunt Valve Co., Inc*., 510 F.3d 610, 616 (6th Cir. 2007) (citations and internal quotation marks omitted).

Plaintiffs'counsel were deprived of the opportunity to review the evidence against them for errors, and the public have been denied the opportunity to evaluate the performance of their public official. The record here provides no basis to determine the amount of fees that were improperly taxed to the plaintiffs because they arose from the City's abuse of the 23 damages depositions to relitigate liability. The trial court had already noted the City's misconduct in that regard in its order denying stay of promotions (R-435, p. 7-8, Page ID# 11349-11350.). Yet nothing in its sanctions order reflects an effort to account for that misconduct in computing the size of the award. There may also have been other unreasonable aspects of the defendants' fee records that plaintiffs' should have had a right to challenge.

Plainly, it was error to award such a large amount of fees without giving the party opposing the size of that award a full opportunity to challenge the reasonableness and relevance of the time expended on the issue upon which the award is based.

CONCLUSION

For the reasons mentioned above, *Amicus* ask this court to vacate the order of sanctions.

Respectfully Submitted by:

/s/ Richard R. Renner
Richard R. Renner
Counsel of Record
Tate & Renner
921 Loxford Terrace
Silver Spring, MD 20901
(301) 681-0664
rrenner@igc.org

Rebecca Hamburg Cappy
National Employment Lawyers Association
417 Montgomery Street, Fourth Floor
San Francisco, CA 94104
(415) 296-7629
rcappy@nelahq.org

Bennet D. Zurofsky
17 Academy Street,Suite 1201
Newark, New Jersey 07102
(973) 642-0885
bzurofsky@zurofskylaw.com

RULE 32(a)(7)(C) CERTIFICATE

I HEREBY CERTIFY that the foregoing Brief Of *Amicus Curiae* National Employment Lawyers Association In Support Of Appellants complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point proportional typeface, Times New Roman. As reported by the OpenOffice.Org application, the contents of the Brief (exclusive of those parts permitted to be excluded under FRAP and the local rules of this Court, such as the Statement of Interest) contain 6,666 words.

Respectfully submitted by:

/s/ Richard R. Renner
Richard R. Renner

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R-237, Verdicts, 12/23/2008, Page ID# 7312-7355
R-278, Judgment, 10/02/2009, Page ID#7748-7754
R-283, Akron's Motion for a New Trial, 10/19/2009, PageID #: 7771-7775
R-307, Order, 09/30/10, Page ID# 7973
R-313, Notice of Appearance, 01/24/2011, Page ID# 8074-8075
R-326, Order, 04/05/11, Page ID# 8173
R-357, Conference Tr., 05/09/11, Page ID# 8295-8302
R-359, Motion to Compel, Page ID# 8346-8351
R-387, Order, 07/05/11, Page ID #:10865-10866
R-403, Order, 07/08/11, Page ID# 10937-10941

R-404, Conference Tr., 07/07/11, Page ID# 10946-10949

R-416, Order, 07/13/11, Page ID# 11104-11108

R-419, Notice of Appeal, 07/14/2011, Page ID# 11115-11117

R-419-1, Conference Tr., 07/07/11, PageID# 11154-11155

R-429, Plaintiffs' Amended Exhibit List, Page ID# 11282-11285

R-435, Order, 07/18/2011, Page ID# 11343-11350

R-441, Plaintiffs' Motion for Reconsideration, 07/21/2011, Page ID# 11399-11405

R-448 Order, 07/25/11, Page ID# 11485

R-449, Marginal Entry, 07/25/2011, Page ID# 11486

R-455-1 Carr depo., 07/25/11, Page ID# 11608-11655

R-457-2, Declaration of Bruce Elfvin, Page ID# 11671-11673

R-468, Trial Tr., 07/26/11, Page ID# 12543-12544

R-469, Trial Tr., p. 340[9]

R-470, Trial Tr., 07/28/11, Page ID# 13136-13156

R-472, Order, 08/02/11, Page ID# 13192

R-476, Order, 08/09/11, Page ID# 13213-13214

R-481, Sealed: City's unredacted invoices, 08/10/2011[10]

R-483, Plaintiffs' Motion for Reconsideration, 08/12/2011, Page ID# 13362-13377

R-484, Order, 08/12/11, Page ID# 13407-13418

R-493-1, Plaintiffs' Exhibit 208, Page ID# 13997-14177

R-496, Plaintiffs' Notice of Request for Unredacted Attorney Fee Bills, 08/22/11, Page ID# 14304-14307

R-498-1, Plaintiffs' Exhibit 208, Page ID# 14445-14625

R-499, City Memorandum, 08/26/2011, Page ID# 14626–14658

---

9 Page ID# is not required for a transcript reference.

10 Page ID# is not required for a sealed item.

R-500, Defendant's Brief, 08/26/2011, Page ID# 14659–14703

R-501, Plaintiffs' Brief and Request for Evidentiary Hearing, 08/26/2011, Page ID# 14704-14719

R-502, Plaintiffs' Opposition to City's Computation of Fees and Costs and Request for Evidentiary Hearing, 08/26/2011, Page ID# 14720-14731

R-503-3, Hearing Tr. Of 06/15/2011, Page ID# 14826-14833

R-530, Order, 09/24/12, Page ID# 15357-15369

R-565, Trial Tr., 11/28/12, Page ID# 15881-15883

/s/ Richard R. Renner
Richard R. Renner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 23, 2013, I caused the foregoing Brief Of *Amicus Curiae* National Employment Lawyers Association In Support Of Appellants to be served through this Court's electronic filing system on all counsel of record.

/s/ Richard R. Renner
Richard R. Renner