CASE NO. 14-11357

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CYNTHIA TURNER,

Plaintiff-Appellee-Cross-Appellant

v.

BOB INZER,

Defendant-Appellant-Cross-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
DC DKT NO. 4:11-CV-567-RS-CAS

PROPOSED BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE-CROSS-APPELLANT AND SUPPORTING REVERSAL

Peter F. Helwig
Counsel of Record
Florida Bar No. 0588113
Harris & Helwig, P.A.
6700 South Florida Avenue, Suite 31
Lakeland, Florida 33813
Telephone: (863) 648-2958
Facsimile: (863) 619-8901
E-Mail: pfhelwig@tampabay.rr.com

Roberta L. Steele, Program Director
National Employment Lawyers Association
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Telephone: (415) 296-7629

Attorneys for National Employment Lawyers Association as Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

The National Employment Lawyers Association ("NELA") is a private, non-profit corporation. There is no parent corporation or publicly held corporation that owns any stock in NELA.

DATED: July 23, 2014.

/s/ Roberta L. Steele
Program Director
National Employment Lawyers Association
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
(415) 296-7629

CERTIFICATE OF INTERESTED PERSONS

Proposed Amicus National Employment Lawyers Association hereby files its Certificate of Interested Persons

1. Bob Inzer, Leon County Clerk of Courts (Defendant)

2. Dena H. Sokolow (Former Counsel for Defendant)

3. Robert W. Evans (Counsel for Defendant)

4. Robert E. Larkin, III (Counsel for Defendant)

5. Matthew D. Stefany (Counsel for Defendant)

6. Shaina H. Thorpe (Counsel for Defendant)

7. Allen, Norton & Blue, P.A. (Counsel for Defendant)

8. Marie A. Mattox (Counsel for Plaintiff)

9. Lisa C. Lambert (Counsel for Plaintiff)

10. Marie A. Mattox, P.A. (Counsel for Plaintiff

11. Cynthia Turner (Plaintiff)

12. Honorable Richard Smoak (District Court Judge)

13. Honorable Charles Stampelos (District Court Magistrate Judge)

14. Proposed Amicus National Employment Lawyers Association

15. Roberta L. Steele, Counsel for Proposed Amicus National Employment Lawyers Association

16. Peter F. Helwig, Counsel for Proposed Amicus National

Employment Lawyers Association

17. Harris & Helwig, P.A., Counsel for Proposed Amicus National Employment Lawyers Association

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STATEMENT OF COUNSEL

The undersigned counsel for the National Employment Lawyers Association as Amicus Curiae hereby states as follows:

(1) I authored this entire brief in whole;

(2) I did not contribute money that was intended to fund preparing or submitting the brief; and

(3) No person other than the amicus curiae, National Employment Lawyers Association, contributed money that was intended to fund preparing or submitting this brief.

Dated: July 23, 2014 /s/ Peter F. Helwig

STATEMENT OF INTEREST

The National Employment Lawyers Association (NELA) 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 69 circuit, state, and local affiliates have a membership of over 4,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace.

SUMMARY OF THE ARGUMENT

The district court erred in three important respects in ruling that the defendant was entitled to attorney's fees. Firstly, it utilized the "Sullivan factors" as the primary test for defendant's claim, to the exclusion of the principles set out by the Supreme Court in Christiansburg Garment Co. v. EEOC for evaluating defense attorney's fee claims in cases brought under the 1964 Civil Right Act. In so doing, the district court focused on the narrow questions of whether the plaintiff stated a *prima facie* case, whether there was a settlement offer, and whether the case was resolved by a pre-trial motion. This stunted analysis ignored binding precedent prohibiting courts from engaging in "hindsight logic" and from awarding defense fees even though a plaintiff's case was based on speculation or was otherwise markedly weak, but not entirely without foundation.

Secondly, in finding that the plaintiff's *prima facie* case failed because she could not point to a comparator whose circumstances were "nearly identical" to hers, the district court ran afoul of Christiansburg's warning against using "*post hoc* reasoning" in deciding defense claims for attorney's fees. With the benefit of summary judgment submissions, including evidence regarding the comparators, the court concluded that the plaintiff's claim was frivolous. This was contrary to the Supreme Court's warning that courts should not use "hindsight logic" to conclude that

a case was frivolous merely because, after discovery, it turned out that there was not sufficient evidence to support the case.

Thirdly, the district court erred in accepting defendant's unsupported representations regarding a settlement offer, but refusing the plaintiff's request to allow her to submit specific information about the offer, which was made at mediation.

ARGUMENT

I. THE SULLIVAN FACTORS WERE INTENDED TO SUPPLEMENT AND NOT SUPPLANT THE COMMANDS OF CHRISTIANSBURG GARMENT CO. V. EEOC

A. The U.S. Supreme Court Restricted The Conditions Under Which Attorney's Fees Can Be Awarded to a Defendant In A Title VII Case.

The limited circumstances in which attorney's fees may be awarded to a defendant in a Title VII case were set out by a unanimous Supreme Court in Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 98 S.Ct. 694 (1978). The Court held a defendant can recover attorney's fees in a Title VII case only upon a showing that "the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421, 98 S.Ct. at 700.

In support of its holding, the Court noted that claims for attorney's fees by a successful Title VII defendant raise different considerations than do claims by a successful plaintiff. Under the 1964 Civil Rights Act, "the plaintiff is the chosen

instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" 434 U.S. at 418, 98 S.Ct. at 699 (quoting Newman v. Piggie Park Enterprises, 390 U.S. 400, 402, 88 S.Ct. 964, 966 (1968)). When a court awards attorney's fees to a prevailing plaintiff in a Title VII case, "it is awarding them against a violator of federal law." *Id.* However, the policy considerations supporting the award of attorney's fees to a prevailing Title VII plaintiff are not present when a prevailing Title VII defendant is seeking fees. *Id.* at 418-19, 98 S.Ct. at 699.

On the other hand, the Supreme Court also discerned a Congressional desire "to protect defendants from burdensome litigation having no legal or factual basis." *Id.* at 420, 98 S.Ct. at 700. The balancing of these considerations led the Court to hold that a defendant may recover attorney's fees against a plaintiff "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.* at 421, 98 S.Ct. at 700.

The standard has subsequently been expressed by the Court as a requirement that the "plaintiff's action must be meritless in the sense that it is groundless or without foundation." Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 178 (1980).

The Christiansburg Court also set out some "important" guidelines for applying this principle. Firstly, courts should not "engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been

unreasonable or without foundation." 434 U.S. at 421-22, 98 S.Ct. at 700. In examining a claim from the perspective of the end result, courts must recognize that "no matter how meritorious [a plaintiff's] claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial." *Id.* Application of "hindsight logic" to such claims could have the effect of discouraging "all but the most airtight claims," a result which would be contrary to the statutory purpose of encouraging private enforcement of Title VII. *Id.*

In addition, when viewing a claim from the perspective of the initiation of the lawsuit, courts must take into consideration the fact that "[e]ven when the law or facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." 434 U.S. at 422, 98 S.Ct. at 701.

B. The Eleventh Circuit Follows The Christiansburg-Hughes Principles And Instructs That Attorney's Fees Awards In Title VII Cases Should Be Circumscribed

In Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1189 (11th Cir. 1985), this Court applied the Christiansburg-Hughes principles in reversing an award of attorney's fees to a prevailing defendant in a case under Title VII and 42 U.S.C § 1983 . Specifically, this Court set out the principles to be applied as follows:

- In order to award attorney's fees to a defendant in a Title VII or Section 1983 case, the district court must find "that the plaintiff's lawsuit was 'frivolous, unreasonable, or without foundation,'" *Id.* at 1188 (quoting Christiansburg).
- A claim is frivolous when it is "is so lacking in arguable merit as to be groundless or without foundation." *Id.* at 1189 (quoting Jones v. Texas Tech University, 656 F.2d 1137, 1145 (5th Cir. 1981)).[1]
- "In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." *Id.* at 1188(quoting Christiansburg).
- Application of "hindsight logic" to the plaintiff's claims would unfairly deter "all but the most airtight claims," as "the course of litigation is rarely predictable" and "[d]ecisive facts may not emerge until discovery or trial." *Id.* at 1188-89 (quoting Christiansburg).
- "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* at 1188-89 (quoting Christiansburg).

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[1]The Jones decision is binding Eleventh Circuit precedent as it was decided by the former Fifth Circuit prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981).

After setting out the above principles, the Court went on to observe that "frivolity" is typically found in those cases where a motion to dismiss or for summary judgment has been filed, and "the plaintiffs did not introduce **any evidence** to support their claims." *Id.* at 1189 (citations omitted and emphasis added). By contrast, "[i]n cases where the plaintiffs introduced evidence sufficient to support their claims, findings of frivolity typically do not stand." *Id.* (citations omitted).

Finally, this Court stated that additional factors "considered important in determining whether a claim is frivolous **also** include: (1) whether the plaintiff established a *prima facie* case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a full-blown trial on the merits." *Id.* at 1189 (citations omitted and emphasis added).

These three numbered elements are the so-called "Sullivan factors." As can be seen above, they are not intended to supplant the general principles articulated in Christiansburg, but rather to supplement them, as they are among those factors that are "also" considered relevant to the frivolity determination.

C. The Eleventh Circuit Construes The "Sullivan Factors" Narrowly In Subsequent Decisions

In the wake of Sullivan, this Court has continued to apply the factors restrictively to defense motions for attorney's fees, describing them in subsequent

decisions as "**[o]ther** factors that **may be relevant** to this inquiry" regarding frivolity, Cordoba v. Dillard's, 419 F.3d 1169, 1176-77 (11th Cir. 2005) (emphasis added), or as as "among" the "several factors" relevant to the issue of frivolity. Bruce v. City of Gainesville, Ga., 177 F.3d 949, 952 (11th Cir. 1999).

1. Award of Defense Attorney's Fee Reversed in Cordoba v. Dillard's

In Cordoba, the trial court granted the defendant's summary judgment motion, dismissing the plaintiff's disability discrimination claim on the ground that, *inter alia*, there was no evidence that the manager who discharged the plaintiff was aware of her disability. This Court affirmed. 419 F.3d at 1175. The trial court then awarded attorney's fees to the defendant, concluding that after the manager's deposition, it should have been apparent to the plaintiff that the manager was unaware of her disability. *Id.* at 1179. Invoking the admonition in Christiansburg against the use of "hindsight logic" in assessing the frivolity of a claim, this Court reversed the award of fees. *Id.* at 1181. The plaintiff's evidence that she told the manager, a year before her discharge, that she had been "going to the doctor a lot" and that the doctors "weren't sure what was wrong," and that other employees were aware of her condition, while not sufficient to prevent summary judgment, was sufficient to show that her claim was not "frivolous" under Christiansburg. *Id.* at 1181. Plaintiff's assertion that the manager was aware of her disability was mere speculation, "but this speculation

was not so unreasonable that it can be termed frivolous." *Id.* It was not sufficient to survive summary judgment, but it was sufficient to require reversal of the award of fees on the ground that the plaintiff's claims, "though weak, were not entirely without foundation." *Id.* at 1182. *See also* Bonner v. Mobile Energy Services, 246 F.3d 1303, 1305 (11th Cir. 2001) (reversing award of attorney's fees where the plaintiff's claims were "markedly weak," but not "actionably frivolous").

Like the plaintiff in Cordoba, Plaintiff Turner in the case *sub judice* based her discrimination claims on speculation, but it was reasonable speculation that the defendant's more favorable treatment of a white employee with numerous errors of the type for which the plaintiff was fired, and of another white employee who was arrested for shoplifting, along with the testimony of two African American employees regarding their unequal treatment by the defendant, were circumstantial evidence of racial discrimination. Doc. 60 at 13-14 (Order granting summary judgment). Like the claims of the plaintiff in Cordoba, the claims of Turner, even if weak, "were not entirely without foundation." Cordoba, 419 F.3d at 1182.

Had the Court in Cordoba incorrectly limited its analysis to a wooden application of the Sullivan factors, as did the district court in the case *sub judice*, the outcome would have been different. There, as here, Sullivan factors, viewed in isolation, supported the award of fees, in that the plaintiff did not establish a *prima*

facie case (due to her failure to show that the decision-maker knew of her disability), the defendant had made only a "nominal" offer of settlement, and the case had been dismissed on summary judgment. *Id.* at 1177.

2. Award of Defense Attorney's Fee Reversed in Bruce v. City of Gainsville

The importance of properly utilizing the Sullivan factors in larger context of the Christiansburg principles is further illustrated in Bruce v. City of Gainesville, Ga., 177 F.3d 949 (11th Cir. 1999). The Court, with one dissenting opinion,[2] correctly reversed an award of defense attorney fees because it was based on *post hoc* analysis. The Court held that the plaintiff's belief he had been discharged because of his disability was not unreasonable, and his claim therefore was not frivolous. The basis for the plaintiff's belief was that after 10 years as a successful employee, he suffered a severe injury to his hand, after which the defendant told him there was no work for him and to turn in his uniforms; he continued to receive paychecks but on what appeared to be

[2]The dissent in Bruce began with the premise that the Sullivan factors were "general guidelines for us to consider in making determinations regarding frivolity," and that they required that the fee award be affirmed. Bruce,177 F.3d at 953 (Magill, J., dissenting). The dissent argued the plaintiff failed to establish a *prima facie* case, the first Sullivan factor, in that he failed to show that he was discharged or otherwise suffered an adverse action. 177 F.3d at 953-54. In addition, the dissent contended, the second and third Sullivan factors supported the award of fees, as there was no settlement offer and the case was dismissed on summary judgment. *Id.* at 953. Contending there was "nothing in this case to justify our avoiding the conclusion that follows from application of the Sullivan factors," the dissent concluded that the court should have affirmed the award of fees to the defendant on that basis. *Id.* at 954.

a different basis; and he was placed in a new job after he filed a charge with the EEOC. *Id.* at 952.

The Bruce majority reconciled Christiansburg and circuit precedent, including Sullivan. This was not a case where the plaintiff failed to introduce any evidence in support of his claim. Although not sufficient to survive summary judgment, the plaintiff's evidence showed that after he contracted his disability, the employer sent him home, told him to turn in his uniforms and took no action to restore him to work until he filed the EEOC charge. The majority heeded Sullivan's command that "a district court must focus on whether the case is so lacking in arguable merit as to be groundless or without foundation rather than whether the claim was ultimately successful." Bruce, 177 F.3d at 952 (citations and internal quotation marks omitted). Although the facts might have appeared "questionable or unfavorable at the outset," the plaintiff "may have an entirely reasonable ground for bringing suit." Sullivan, 773 F.2d at 1188-89 (quoting Christiansburg). By refusing to rely on a wooden application of the Sullivan factors, as the dissenting opinion urged, the majority honored Sullivan's warning that the factors are not "hard and fast rules," and that defense fees are not to be awarded unless the plaintiff's case "is so lacking in arguable merit as to be groundless or without foundation," *Id.* at 1189 (citation omitted). Such is not the case here.

In amplification of the above standard, this Court has held that courts must interpret "Christiansburg's caution against second-guessing to require that, when determining whether a claim was or became frivolous, we view the evidence in the light most favorable to the non-prevailing plaintiff." Johnson v. Florida, 348 F.3d 1334, 1354 (11th Cir. 2003) (citing EEOC v. Pet, Inc., 719 F.2d 383, 384 (11th Cir. 1983)).

D. The Supreme Court Also Cautions Against Awarding Defense Attorney's Fees In Cases Decided by Pre-Trial Motion

An additional factor that must be considered before awarding defense fees was articulated by the Supreme Court in Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 178 (1980), which applied Christiansburg to a constitutional claim brought under 42 U.S.C. § 1983. Where the plaintiff's allegations are dismissed for failure to state a claim, thus arguably meeting the first (no prima facie case) and third (dismissed before trial) Sullivan factors, fees may not be awarded to the defendant where the plaintiff's claim "deserved and received the careful consideration" of the court. *Id.* at 15, 101 S.Ct. at 179. "Allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' as required by Christiansburg." *Id*. In other words, where a court concludes that a plaintiff did not state a *prima facie* case, and/or that summary judgment for a

defendant is warranted, an award of attorney's fees to the defendant is improper if the plaintiff's claims were "meritorious enough to require careful attention and review." Bates v. Islamorada, 2007 WL 2113586, at *6 (S.D. Fla. 2007) (quoting Busby v. City of Orlando, 931 F.2d 764, 787 (11th Cir.1991)). *Accord* Walker v. NationsBank of Fla., 53 F.3d 1548, 1559 (11th Cir.1995).

In the case at bar, the district court erred by relying exclusively on the Sullivan factors to award attorney's fees to the defendant. Although first reciting the appropriate Christiansburg standards, the Court engaged in all of its analysis of the plaintiff's claims in the next and longest section of its order, entitled "Sullivan Factors." Doc. 123 at 3-6. In so doing, it limited its analysis to whether Turner established a *prima facie* case, and whether the case was dismissed prior to trial. *Id.* It failed to apply the broader Christiansburg principles and in particular violated the admonition against "*post hoc* reasoning," awarding fees based on the body of evidence that resulted in the ultimate decision on the merits of Turner's claim. It failed to apply circuit precedent establishing that where a plaintiff's claims are weak or even "markedly weak," but "not entirely without foundation," an award of defense attorney fees is an abuse of discretion. Cordoba, 419 F.3d at 1182; Bonner, 246 F.3d at 1305. Consideration of the Christiansburg-Hughes principles in tandem with the Sullivan

factors requires in this case that the award of attorney's fees to the defendant be reversed.

II. THE "SULLIVAN FACTORS" HAVE LIMITED VALUE IN ASSESSING DEFENSE CLAIMS FOR ATTORNEY'S FEES AND SHOULD BE TREATED AS SUCH

In the nearly thirty years of their existence, the "Sullivan factors" have been of limited utility in helping to assess defense claims for attorney's fees. The experience with each of the three factors is discussed immediately below. In particular, the first factor – whether the plaintiff has established a *prima facie* case – has not only been of limited worth, but has been the source of much conflict and confusion.

A. The First Sullivan Factor: Whether the Plaintiff Established a Prima Facie Case

1. Reliance on the *prima facie* case, as defined by circuit precedent, subverts the principles set out in Christiansburg

In employment law, the *prima facie* case is an element of a formulation for proving disparate treatment by circumstantial evidence, as originally set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973).

In a refusal to hire case, the elements of a *prima facie* case generally are as follows:

> [T]he plaintiff must demonstrate only that: (i) he or she belonged to a protected class; (ii) he or she was qualified for and applied for a position that the employer was seeking to fill; (iii) despite qualifications, he or she was rejected; and (iv) the position was filled with an individual outside the protected class.

Vessels v. Atlanta Independent School System, 408 F.3d 763, 768 (11th Cir. 2005) (footnote omitted)(citing McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824).

The plaintiff's *prima facie* showing shifts to the employer the burden articulating a legitimate, nondiscriminatory reason for its action. McDonnell Douglas, 411 U.S. at 802, 93 S.Ct. at 1824. The employer's articulation then shifts to the plaintiff the burden to show the proffered reason was a pretext for discrimination. McDonnell Douglas, 411 U.S. at 804-05, 93 S.Ct. at 1825. This can be done by comparator evidence or other evidence of pretext such as the falsity of the employer's proffered reasons, a history of the employer's past discriminatory treatment of the plaintiff, or evidence of the employer's policy and practice with respect to employment of members of the protected class.[3] *Id.*; Patterson v. McLean Credit Union, 491 U.S. 164, 187-88, 109 S.Ct. 2363, 2378 (1989).

In our circuit, application of the McDonnell Douglas formulation is complicated by the requirement that in certain cases more is required in order to state a *prima facie* case. In cases of discriminatory promotion, discipline and discharge, the additional

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[3]Comparator evidence is not required at any stage of the case. As the Supreme Court held in Patterson, comparator evidence is appropriate, but not required. Patterson, 491 U.S. at 187-88, 109 S.Ct. at 2378 (finding that "[t]he District Court erred . . . , however, in instructing the jury that in order to succeed petitioner was *required* to make such a showing") 491 U.S. at 187-88, 109 S.Ct. at 2378 (emphasis in original).

requirement of identifying a specific "similarly situated" comparator is commonly added. Thus in Maniccia v. Brown, 171 F.3d 1364 (11th Cir. 1999), a case alleging discriminatory discharge based on sex, the requirements for a *prima facie* case of disparate treatment were set out as follows:

> To establish a prima facie case of disparate treatment,[the plaintiff] must show: (1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated male employees more favorably; and (4) she was qualified to do the job.

171 F.3d at 1368 (citations omitted). The comparator employee is not "similarly situated," the court held, unless "the quantity and quality of the comparator's misconduct [are] nearly identical." *Id.* (citation omitted). Maniccia's requirement that the posture of the comparator be "nearly identical" continues to be routinely applied in our circuit. *See, e.g.*, Brown v. Alabama Department of Transportation, 597 F.3d 1160, 1174 (11th Cir. 2010) (promotion case); Brown v. Jacobs Engineering, -- Fed.Appx. –, 2014 WL 3511632, at *1 (11th Cir. 2014) (discharge case).

The use of the *prima facie* case, in this more muscular form, as an indicator of frivolousness, subverts the most basic commands of Christiansburg. Firstly, it opens a back door through which defendants can invite courts to engage in prohibited *"post hoc* reasoning." Under the Maniccia formulation, in order to meet her initial burden of establishing the *prima facie* case, the plaintiff must identify potential comparators,

offer what evidence she has to show that they are "nearly identical," then anticipate the defendant's proffered evidence as to why they are not "nearly identical," and still offer evidence to counter the defendant's evidence. In many cases, as occurred in this case, meeting this heavy burden requires discovery and analysis of documentary and testimonial evidence, which likely was not available to the plaintiff at the time the case was filed. To analyze whether a plaintiff is able to make out a *prima facie* case after discovery has been taken upon a defense motion for attorney's fees is wholly at odds with the Supreme Court's command that "courts should not "engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation." Christiansburg, 434 U.S. at 421-22, 98 S.Ct. at 700.

Similarly, Christiansburg directed that courts refrain from using "hindsight logic" when viewing claims from the perspective of the end result. This is so because "no matter how meritorious [a plaintiff's] claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial." *Id.* Details about the offenses committed by a comparator are likely to be buried in personnel files, supervisor notes, timekeeping and other records, and commonly are not exposed to the light of day without extensive discovery, including document requests and depositions. To award fees to the defendant because

troublesome facts "did not emerge until discovery" completely subverts the prohibition against "hindsight logic."

Christiansburg was also concerned that Title VII plaintiffs not be exposed to potential awards of defense attorney fees in "all but the most airtight claims." *Id.* To award fees based on a plaintiff's failure to make the detailed and difficult showing that a comparator is "nearly identical" violates this principle as well.

2. The concept of the McDonnell Douglas *prima facie* case is inapplicable in many Title VII cases

In a hostile work environment case, the burden-shifting framework of McDonnell Douglas does not apply, so there is no concept of a McDonnell Douglas *prima facie* case of hostile work environment. Johnson v. Booker T. Washington Broadcasting Service, Inc., 234 F.3d 501, 510-511 (11th Cir. 2000) (citing Henson v. City of Dundee, 682 F.2d 897, 905 n.11 (11th Cir. 1982)). It does not apply in a "direct evidence" case, where the plaintiff relies on evidence showing an employer's discriminatory intent directly without resort to the inferences and presumptions of the McDonnell Douglas formulation. Hinson v. Clinch County, Georgia Board of Education, 231 F.3d 821, 827 (11th Cir. 2000).

Additionally, even in a disparate treatment case of discriminatory hiring, promotion or discharge, the McDonnell Douglas approach is not the only method of

proof. In Smith v. Lockheed-Martin Corp., 644 F.3d 1321 (11th Cir. 2011), the district court granted summary judgment on a claim of discriminatory discharge because the plaintiff failed to show that his comparator was "similarly situated." This Court agreed that the plaintiff had failed to identify a comparator in "nearly identical" circumstances, and thus did not make out a McDonnell Douglas *prima facie* case. *Id.* at 1326. However, this Court held that plaintiffs are not required to rely on the McDonnell Douglas framework as the exclusive method of proving a case of disparate treatment, and reversed the grant of summary judgment because the plaintiff had produced other circumstantial evidence sufficient to create "a triable issue concerning the employer's discriminatory intent." *Id.* at 1327-28. One consequence of Smith's holding is that in a disparate treatment case, "the plaintiff's failure to produce a comparator does not necessarily doom the plaintiff's case," because circumstantial evidence can be sufficient even if it does not fit the McDonnell Douglas burden-shifting formula. *Id.* at 1328.[4]

[4] *See also*, Hamilton v. Southland Christian School, 680 F.3d 1316, 1329 (11th Cir. 2012) (plaintiff's failure to produce non-pregnant comparator dooms her claim under McDonnell-Douglas formulation, but summary judgment is reversed because plaintiff presented "enough circumstantial evidence to raise a reasonable inference of intentional discrimination"); Chapter 7 Trustee v. Gate Gourmet, 683 F.3d 1249, 1255-56 (11th Cir. 2012) (though plaintiff failed to establish McDonnell Douglas *prima facie* case due to lack of an appropriate comparator, summary judgment for defendant is reversed where plaintiff produced "non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination" and thereby create a triable issue") (citations and internal quotation marks omitted); King v. Volunteers of America, 502 Fed.Appx. 823, 827-28 (11th Cir. 2012) (though plaintiff is unable to identify a

3. Alternatives to reliance on the *prima facie* case in attorney's fee disputes

As shown above, the McDonnell Douglas *prima facie* case is of no value whatsoever in analyzing the potential frivolousness of claims in at least three types of cases – hostile work environment cases, direct evidence cases and disparate treatment cases using the method of proof approved in Smith v. Martin Marietta.

Where it does come into play in a defense motion for attorney's fees, this circuit's muscular "nearly identical" standard overwhelms the analysis and pushes toward results inconsistent with the basic principles laid down in the Christiansburg and Sullivan cases.

Instead of focusing on whether the plaintiff, after discovery, has established a *prima facie* case, courts should look to see whether the plaintiff has produced "some" evidence of discrimination. As the Sullivan Court itself observed, cases where defense attorney fees are generally awarded are those in which "the plaintiffs did not introduce **any** evidence to support their claims." Sullivan, 773 F.2d at 1189 (emphasis added). This is consistent with the approaches taken by courts in other circuits.

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similarly situated comparator, evidence of racist statements by manager, leading to discharge by another manager acting as his "cat's paw," is sufficient to survive summary judgment); Jackson v. Checkers Drive-In Restaurants, 2011 WL 3171812, at *4 (M.D. Fla 2011) (summary judgment denied where plaintiff failed to meet "comparator" element of *prima facie* case but presented other circumstantial evidence sufficient to create a triable issue).

In Montgomery v. Yellow Freight System, 671 F.2d 412 (10th Cir. 1982), a race discrimination case, the plaintiff was a mechanic who was fired allegedly for falling asleep in the cab of a truck. The plaintiff introduced evidence of a disparaging racial comment by the terminal manager, who was not the person who discharged him; and of an occasion where three mechanics, including the plaintiff, were found asleep in the break room and were not discharged. The Tenth Circuit affirmed the judgment for the defendant, but denied the employer's motion for an award of its attorney's fees for the appeal. Following Christiansburg, the court reasoned that

> [t]he fact that plaintiff did not prevail does not necessarily mean that [the Christiansburg] criteria are met. In order to penalize the plaintiff with attorneys' fees, we must be persuaded that the record is devoid of any evidence of discrimination. There was some evidence of disparate treatment in the record, although it was not sufficient for plaintiff to prevail. Therefore, the record in this case does not persuade us that plaintiff's action in appealing this suit was frivolous, unreasonable, without foundation or in bad faith so as to justify awarding attorneys' fees to defendant.

Id. at 414 (citation omitted). This result is consistent with Eleventh Circuit precedent holding that an award of defense attorney's fees is an abuse of discretion where the plaintiff's claims, "though weak, were not entirely without foundation." Cordoba, *supra*, 419 F.3d at 1182; Bonner, *supra*, 246 F.3d at 1305.

Similarly, in EEOC v. Kenneth Balk & Associates, 813 F.2d 197 (8th Cir. 1987), the Eighth Circuit reversed an award of attorney's fees to a prevailing

defendant, where the case was resolved in a bench trial where "conflicting evidence and testimony" were presented. The court reasoned that the conflicting evidence included some evidence of discrimination and concluded that "[s]o long as the plaintiff has 'some basis' for the discrimination claim, a prevailing defendant may not recover attorneys' fees." *Id.* at 198 (citing Obin v. Dist. No. 9 of International Ass'n of Machinists, 651 F.2d 574, 587 (8th Cir.1981)).

In Williams v. City of Carl Junction, 523 F.3d 841 (8th Cir. 2008), the Eight Circuit reversed an award of defense attorney's fees because the plaintiff's claims had "some basis." *Id.* at 843 (citing EEOC v. Kenneth Balk & Associates). The plaintiff alleged that the City retaliated against him for his protected First Amendment activities by issuing 26 baseless municipal citations to him. Although he produced no evidence of the City's retaliatory motive, and summary judgment was granted for the City, the sheer number of the citations provided "some basis" for his claims and thus was sufficient to avoid an award of defense attorney fees. *Id.*

Introduction of the "some evidence" consideration into the first Sullivan factor would mitigate the subversive effect of the "nearly identical" standard applied to a *prima facie* case in this circuit. Even if the "nearly identical" standard were appropriate in summary judgment analysis, it is out of step with and possibly has unintended consequences in attorney's fee disputes. It should not be used to preclude

consideration of whether the plaintiff, having failed to establish a *prima facie* case of discrimination post discovery, raised claims which, "though weak, were not entirely without foundation." Cordoba, 419 F.3d at 1182; Bonner, 246 F.3d at 1305.

Moreover, in cases based on claims alleging hostile work environment, or claims of disparate treatment relying on Smith v. Martin Marietta or direct evidence models of proof, the *prima facie* case factor has no application. The "some evidence" consideration is an appropriate vehicle for filling the gap and addressing both of these situations.

B. The Second Sullivan Factor: Whether the Defendant Offered to Settle

After an extensive if not exhaustive review of the cases on defense claims for attorney's fees in this circuit, undersigned counsel has located only one case in which a court found that a defense offer of settlement weighed against an assertion that a plaintiff's claims were frivolous. *See* Bonner v. Mobile Energy Serv. Co., 246 F.3d 1303, 1305 (11th Cir.2001) (defendant's $125,000 settlement offer is one indication that the plaintiff's claims were not frivolous). More typical of the treatment of the offer to settle factor is this Court's statement that it had "no way of knowing whether a settlement offer, if made, was of a sufficient amount to support a determination that [plaintiff's] claim was not frivolous." Quintana v. Jenne, 414 F.3d 1306, 1310 (11th Cir. 2005). There is also a line of cases that disregards any settlement offer made at

mediation, because it is somehow irrelevant for having been made as part of a good faith effort to participate in mediation. *See, e.g.*, Wingfall v. St. Leo University, 2012 WL 3854551, at *4 (M.D. Fla. 2012), *rev'd in part on other grounds*, 539 Fed. Appx. 942, 946 (11th Cir. 2013). In yet other cases, the parties simply reported that there was no settlement offer. Bruce, 177 F.3d at 953.

In the case *sub judice*, the defendant apparently reported to the district court that it made a "cost of defense" settlement offer, but proffered no evidence of the content of the offer. In response, the plaintiff apparently sought leave to submit information regarding the offer, requesting a waiver of the confidentiality requirements attendant to the mediation process, but that request was denied. *See* Appellee/Cross-Appellant's Initial Brief and Answer Brief (filed 7-16-14) at 19-20.

Settlement offers are frequently made in the context of court-annexed mediation, and are confidential. Indeed, Eleventh Circuit Rule 33-1.c.3 provides as follows:

> Communications made during the mediation and any subsequent communications related thereto shall be confidential. Such communications shall not be disclosed by any party or participant in the mediation in motions, briefs, or argument to the Eleventh Circuit Court of Appeals or to any court or adjudicative body that might address the appeal's merits, except [to address a party's failure to comply with the mediation requirements].

Some district courts in the circuit have similar rules. *See, e.g.*, Local Rule 9.07(b) of the Middle District of Florida; Local Rule 16(g) of the Southern District of Florida. A party who discloses settlement proposals made at mediation in its opposition to a motion for sanctions and attorney's fees is subject to sanctions. Rodriguez v. Marble Care International, 863 F.Supp.2d 1168, 1181-82 (S.D.Fla. 2012).

Even where a settlement offer was not made at mediation, Rule 408(a)(2) of the Federal Rules of Evidence states that offers of settlement are not admissible in any proceeding "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." It is a violation of the rule to disclose a defense settlement offer for the purpose of demonstrating, in response to the defendant's motion for attorney's fees, that the plaintiff's claims were not frivolous. Alphonso v. Pitney Bowes, 356 F.Supp.2d 442, 447 n.4 (D.N.J. 2005).

Finally, it is conceivable that a defendant who believes it has a chance to prevail on summary judgment might refrain from making a settlement offer, in the reasonable belief that such offer would be turned against it if it did prevail and attempted to recover attorney's fees. In such a scenario, the parties and the court would be deprived of an opportunity to settle the case prior to the filing and adjudication of the summary judgment motion. Contrary to strong public policy favoring settlements and the efficient and expeditious resolution of disputes, the parties and the court would need

to expend significant time and resources on a mater that could have been resolved but for the defendant's reluctance to make a realistic settlement offer for fear of prejudicing a later claim for fees. Notably, the one case where a substantial defense settlement offer played a role in resolving a fee petition involved a defendant that made the offer prior to declaring bankruptcy and thus may not have been overly concerned with prejudicing its right to seek fees. Bruce, 177 F.3d 949, 953.

Given that the disclosure of a settlement offer in fee proceedings may be unlawful regardless of whether the offer was made in mediation, it is no wonder that the cases discussing such offers are sparse. Moreover, given that a substantial offer of settlement would weigh against a defense claim for attorney's fees, it is not surprising that cases identifying substantial settlement offers are also scant. If the second factor is in the end not useful or practicable and creates a perverse disincentive for defendants to make substantial settlement offers prior to summary judgment, perhaps now is the time to abandon it.

C. The Third Sullivan Factor: Whether the Trial Court Dismissed the Case Prior to Trial

As a predicate to an award of attorney's fees, a defendant must prevail either in a pre-trial disposition – generally summary judgment – or at trial. Where a defendant prevails at trial, this result comes only after an unsuccessful motion for summary

judgment, as the filing of defense summary judgment motions is standard practice in employment discrimination cases.[5] A defendant who wins at trial, after an unsuccessful motion for summary judgment, is unlikely to seek attorney's fees, as the denial of summary judgment would be strong evidence that the plaintiff's claims were not frivolous. Cordoba , 419 F.3d at 1182.

Nearly all defendants who move for attorney's fees will have obtained dismissal on pre-trial motions. It would not be a stretch to state that employers seeking fees are "by definition" employers who were successful in summary judgment or other pre-trial dispositions. The fact that a case was dismissed prior to trial does not distinguish the frivolous case from the many other cases which were dismissed but were not frivolous.

To give a defendant credit for satisfying a Sullivan factor advantages the defendant even before the analysis begins, simply because the defendant is in the broad class of nearly all other defendants who seek attorney's fees. Where the Sullivan factors are used as the sole or major determinant of the outcome, the third factor places a thumb on the defendant's side of the scale which is contrary to Christiansburg.

D. The Sullivan Factors – Conclusion

[5]For example, the undersigned in over 30 years' practice has litigated discrimination claims in federal court on behalf of hundreds of employees. In only one of those cases has the defendant, when the time for filing arrived, failed to file a motion for summary judgment.

The net effect of the Sullivan factors is that the plaintiff comes to bat with two strikes against her, as did Plaintiff Turner in the case at bar.

One strike is due to confidentiality and other constraints that prevent parties from providing any information to the court about settlement offers. As a result, evidence that a substantial settlement offer may have been made cannot be offered, and the plaintiff has no opportunity to argue that the second factor supports its defense against a motion for attorney's fees.

Strike two occurs due to the fact that summary judgments in Title VII cases are ubiquitous, and that most fee petitions are made in cases where summary judgment was granted. The third Sullivan factor automatically go into the defense column in the Sullivan factor score sheet.

As a result, most defense claims for attorney's fees come before the court after the granting of summary judgment, and with no evidence of any settlement offers by the defendant. The second and third Sullivan factors have thus become automatic check boxes in favor of an award of defense attorney's fees, even though they have little if any value in separating frivolous claims from other unsuccessful claims.

The final strike occurs when assessing frivolity. If the Sullivan factors are the primary determinant of frivolity, then the plaintiff has to make her case, with two strikes already against her, on the first factor, in the treacherous realm of the *prima*

facie case. This unjustifiably skews the outcome in favor of the defendant and an award of fees.

These problems can be minimized if (1) the Sullivan factors are restored to their intended role of supplementing, rather than supplanting, the commands of Christiansburg; (2) the first (*prima facie* case) Sullivan factor is applied in conjunction with other applicable principles so that, where the demanding requirements of Maniccia are not met, the court must look more deeply to determine whether the plaintiff had "some basis" for her claim; (3) the second factor is eliminated altogether or is treated as neutral unless both parties have an opportunity to submit information regarding settlement offers; and (4) reduced weight is given to the third factor, or it is treated it as a *sine qua non* for defense fee motions, in that it will be the rare fee petition that does not follow a pretrial dismissal of the plaintiff's case.

CONCLUSION

The award of attorney's fees to the defendant in this case must be reversed, based on the court's abuse of discretion by (1) relying on the "Sullivan factors" to the exclusion of the basic principles set out by the Christiansburg, Hughes and Sullivan decisions; (2) in applying the Sullivan factors, invoking the rigorous standards for comparator evidence to control the outcome, thereby side-stepping the requirements of Christiansburg and of this Court as expressed in its Cordoba and Bruce decisions;

and (3) in applying the Sullivan factors, denying the plaintiff the opportunity to invoke the second factor (settlement offer) by accepting non-quantified representations from the defendant and denying the plaintiff's request to waive mediation confidentiality to allow her to submit evidence relevant to the second factor.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief consists of 6,950 words, and is therefore in compliance with Rules 29(d) and 32(a)(7)(B)(ii) of the Federal Rules of Appellate Procedure.

/s/ Peter F. Helwig

Peter F. Helwig
Counsel of Record
Florida Bar No. 0588113
Harris & Helwig, P.A.
6700 South Florida Avenue, Suite 31
Lakeland, Florida 33813
Telephone: (863) 648-2958
Facsimile: (863) 619-8901
E-Mail: pfhelwig@tampabay.rr.com

Roberta L. Steele, Program Director
National Employment Lawyers Association
44 Montgomery Street, Suite 2080
San Francisco, CA 94104
Telephone: (415) 296-7629

Attorneys for National Employment Lawyers Association as Amicus Curiae

Certificate of Service

I hereby certify that on this 23rd day of July, 2014, a true and correct copy of the foregoing was sent by ECF and U.S. Mail, postage prepaid, to

Marie A. Mattox
Lisa C. Lambert
Marie A. Mattox, P.A.
310 East Bradford Road
Tallahassee, Florida 32303

Robert E. Larkin III
Matthew D. Stefany
Allen Norton and Blue
906 Monroe Street
Tallahassee, Florida 32303

/s/ Peter F. Helwig
Peter F. Helwig